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Transforming the South African magistracy: how far have we come?

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A minor dissertation submitted in partial fulfillment of the requirements for the award of the degree of Master of Philosophy in Justice and Transformation

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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ABSTRACT

This research paper critically explores the transformation process of the South African magistracy and examines how far the institution has come in aligning itself with internationally accepted standards of independence. The research project was designed as an exploratory pilot project, first reviewing the limited available literature and then initiating a small non-representative set of interviews with such magistrates as were available. The purpose of these interviews was to investigate potential relevant issues which might then be followed up by a more systematic and representative survey. More specifically, the paper investigates the status of magistrates prior to 1994 with a specific focus on their relationship to the state, and then considers the changes that have taken place. In this regard the unique opportunity provided by the Truth and Reconciliation Commission for the magistracy to examine its role in the past and make suggestions for the future was an important milestone in the early phases of transition to democracy. The magistrates' response to this transitional strategy of truth telling and its possible effect on transformation are examined. This is followed by an examination of the magistracy's current status in the context of legislative and institutional changes. The paper concludes that the South African magistracy meets the basic requirements of international standards of independence but that there are still significant areas of concern that need to be addressed with regards to the magistracy's independence.

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CHAPTER ONE INTRODUCTION

1.1 Background to the problem

Adherence to the rule of law is essential in any democracy and encompasses a number of fundamental principles. These include that government authority should be exercised legitimately and in accordance with publicly promulgated written laws that are binding on all people and organs of state in order to protect against lawlessness and anarchy. These laws should express the will of the citizens and people should be willing to obey them. Together these principles express the concept of legality (Matthews, 1971: 3).

The concept also implies that institutional arrangements should be based on the doctrine of separation of powers with three distinct arms of government: the executive, the legislature, and the judiciary; and finally it requires the courts and the judiciary to be independent, impartial and free from political interference as they are the practical means by which the idea of legality is expressed as an operative principle (Matthews, 1971:14). The principle of judicial independence supports the rule of law in several ways: by maintaining public confidence in the courts as institutions as well as in the judiciary; by supporting decision-making based on facts, evidence and legal argument rather than 'external direction'; and by reducing, the risk of assumed or actual bias in favour of government in disputes between citizens and government (Gleeson in Mack and Roach Anleu, 2006: 372).

Prior to 1994, South Africa was not a democracy. It was a country ruled by a government elected by a white minority which implemented laws and policies designed to keep a nation divided on racial lines and to oppress the disenfranchised black majority.

Apartheid was a system of racial segregation and systematic discrimination entrenched by law. But the legalistic nature of apartheid should not be confused with the rule of law which holds implicit that laws are able to be obeyed. The principles of equality before the law and the protection of human rights inherent in the rule of law were largely absent in the South African situation. Instead South Africa was governed by a policy of 'rule by law', one where its citizens were ruled by 'bad law' (Asmal, foreword in Dyzenhaus 1998: ix). In effect there were two legal systems in place: the one for black people did not meet the standards of the rule of law and respect for individual rights, whilst the one for whites treated people rather benignly (Chaskalson et al, 1998:23). Justifiably, the majority of South Africans failed to see the exercise of government authority as legitimate.

In the words of Chaskalson et al (1998, 22) 'any examination of the role of law in our society in the last thirty years must start from the recognition that law was the primary tool used to give effect to apartheid'. Law was used as an instrument of the apartheid government, and it was judges and magistrates who upheld those laws on a daily basis in the courts (Dyzenhaus, 1998: 27).

The South African courts have their roots in the British colonial system of administration and are divided into the higher courts which are headed by judges and the lower courts headed by magistrates. During apartheid judges were appointed by the Minister of Justice and were all white and drawn from the ranks of senior advocates. It was widely perceived that applicants' political views were an influencing factor in the selection process, but in varying degrees over the years (Chaskalson, 1998:32). Although the political nature of appointments had an effect on the standards of the courts, 'nonetheless throughout the [apartheid] period the South African Supreme Court as a whole remained an independent court' (Kentridge in Friedman, 1998: 57). Judges were afforded some of the accoutrements of independence such as security of tenure (Gready and Kgalema, 2000: 7).

Magistrates, on the other hand, were not considered independent judicial officers. Section 9 of the Magistrates Court Act 32 of 1917 placed magistrates within the sphere of the public service. Although the Act had been amended in 1944 to allow for appointment of magistrates by the Minister rather than the Governor-General, magistrates continued to be placed within the public service. They did not have security of tenure, received directives from the Department of Justice; could be investigated by the executive on charges of misconduct and were dependent on merit assessments for promotion or salary increases (Gready and Kgalema, 2000: 7-8). Before 1994 the magistracy could therefore not be seen as independent and impartial, but rather as compromised and part of the executive.

The lower courts are separated into two tiers – the district courts which have criminal jurisdiction in all matters except treason, murder and rape and the regional courts which have jurisdiction in all matters except treason (Section 89 of the Magistrates Court Act No 32 of 1944). A district court has the penal jurisdiction to impose a sentence of imprisonment of up to three years, in addition to a fine not exceeding an amount of R60 000 (the amount is determined from time to time by the Minister of Justice by notice in the *Government Gazette*). A regional court has a higher penal jurisdiction, and can impose imprisonment for a period not exceeding 15 years and a fine up to a limit of R300 000 (similarly determined by the Minister) (Section 92(1) of the Magistrates Court Act No 32 of 1944).

The majority of South Africans have always come into contact with the legal system through the magistrates' courts and it is here that more than 95% of civil and criminal cases are dealt with (Justice Vision 2000, 1997:25). It was in the magistrates' courts that the systematic aspects of racial oppression such as pass laws, segregation laws and detentions without trials were implemented on a daily basis. Magistrates were seen by many South Africans as "managers in the apartheid enforcement machine" (Dyzenhaus, 1998: 59).

Already in 1979 a Commission of Inquiry identified the undesirability of a compromised magistracy too closely associated with the executive branch. The Hoexter Commission, appointed by the Nationalist government to investigate the structure and functioning of the courts, found, among other things, that 'magistrates in fact perform certain executive functions which are totally incompatible with the judicial nature of their office' (Hoexter Commission, 1983: 57). It noted, too, that this gave rise to 'severe public criticism of the lower courts' (Hoexter Commission, 1983: 57). Recommendations from the Commission included the removal of magistrates from the public service and the establishment of an advisory body for their appointment, discipline and discharge, security of tenure and remuneration (Hoexter Commission, 1983: 93). However, the problems of a compromised magistracy identified in this report were ignored by government, and magistrates continued to work as public servants with close links to the executive until the start of the constitutional and structural changes brought about by the transition to democracy in the 1990s.

South Africa's negotiated settlement for democracy ensured, on the one hand, that the (relatively independent) judiciary remained in place. On the other hand it signaled that various statutory and other initiatives would have to be implemented in order to address the imbalances inherited from a flawed judicial system and to instill public confidence in justice and the rule of law. Transformation of the magistracy into an independent institution commenced before the end of apartheid with the Magistrates Act 90 of 1993 when magistrates were statutorily removed from the public service. Further transformation has been introduced by various other legislative and structural changes.

A unique element of the transformation of the South African judiciary during the transitional phase, was provided by the Truth and Reconciliation Commission (TRC). In effect the TRC constituted a mechanism to review and record the defects of the past including those of the judiciary.

One of the greatest challenges to an emerging democracy is the issue of what to do with officials in the public sector who had served the prior repressive regime (Kritz, 1995: xxxiv). Leaving institutional structures and personnel unchanged can prove to be enormously problematic (Boraine, 2004:4).

Some countries in transition have chosen to purge these officials: in post-war France this process was called *epuration* whilst in most of the former communist states in Central and Eastern Europe, it was called *lustration* (Kritz, 1995: xxxiv). The challenge in any such process of purging lies in the fact that the new government also needs to restore public confidence in the institutions of government yet it is these same functionaries targeted for purging who may be the only ones with the knowledge and experience to staff the judicial institutions. While justice and accountability require their purging, practical considerations can make them indispensable (Kritz, 1995: xxxiv).

The courts present an interesting problem within this purge process because, on one hand, the rule of law requires an independent judiciary unaffected by political influences (Kritz, 1995: xxxv). This generally means that judges should not be easily removable from their posts and, even if they were, it would take years to train a qualified class of new lawyers and judges to replace them on the bench (Kritz, 1995: xxxv). Yet, on the other hand, in most countries where transition has taken place from an authoritarian or totalitarian regime to a democracy, the judiciary was severely compromised and very much a part of the old system (Kritz, 1995: xxxv). The South African situation of having a large part of the judiciary who were public servants whilst having others as nominally more independent exacerbated the problem.

A recent United Nations survey on judicial officers found that 62% of those surveyed in South Africa had been judicial officers since before the advent of democracy while more than half had Afrikaans as their first language. (Redpath, 2005: 38) This indicates that the judiciary remains an institution staffed by many

individuals who were on the bench during the apartheid era. Unsurprisingly there have been public allegations and counter-allegations of racism within the judiciary and at the Bar. These seem to indicate that the legal sector as a whole has not done well in terms of transformation. The United Nations survey found that 52% of respondents thought that the race of the judge influenced how he or she judged a case (Redpath, 2005: 10). A recent survey concluded that 'most South Africans are doubtful about the independence and effectiveness of South Africa's judiciary' (Business Day: 19/7/2005).¹ Similarly the United Nations survey found that more than half the court users surveyed had perceptions of a lack of independence in the courts in that they thought that government controlled the justice system (Redpath, 2005: 4).

For its part, the ruling African National Congress, criticized the judiciary in a policy statement at its 93rd anniversary celebrations in early 2005 by saying that many judges and magistrates did 'not see themselves as being part of the masses and accountable to them...' It accused the judiciary of having a 'collective mindset that was not in line with the vision and aspirations of the millions who engaged in the struggle to liberate our country from white-minority domination' (Sunday Times: 9/1/2005). Clearly many problems persist within the judiciary as an institution in post-apartheid South Africa, and much remains to be investigated as to the nature of those problems.

At the same time, a number of strategies have been implemented to facilitate transformation of the judiciary. This study focuses on two transitional justice strategies - truth-telling and institutional transformation. The basic mandate of the TRC was to investigate gross human rights violations; however it interpreted this to include specialized hearings to assess the role of the entire legal sector (including the judiciary) in supporting state repression. These specialised hearings aimed at evaluating the institutional responses to human rights abuses as well as outlining the weaknesses in institutional structures or laws that should

¹ This survey cannot be said to be representative of all South Africans (it was limited to urban areas) and the sample was not large enough to be nationally representative.

be changed (Hayner, 2001:29). Yet the judiciary – both judges in the higher courts and magistrates in the lower courts – deliberately and conspicuously stayed away from the TRC's Special Legal Hearings, thus foregoing this opportunity for addressing its complicity with the prior apartheid regime.

The process of transformation of the magistracy involved a number of phases starting with i) their statutory removal from the public service in 1993, followed by ii) an opportunity to assess the shortcomings of the past in the context of the TRC process during 1996-97, as well as iii) various more specific legislative and policy changes. These changes have not been guided by any overarching policy specifically governing the magistracy as an institution. Instead the transformation of the magistracy has been included in the broader goals of transforming the justice system as a whole.

As will be seen in the literature review in Chapter 2 there has been very little research and no overall critical examination of the progress of transforming the magistracy to date. This thesis sets out to address the major gap in current research and literature on the transformation of the magistracy in the new democratic South Africa. Given the magistracy's key role in the justice system, it is important to see how far the South African lower courts have come in aligning themselves with internationally accepted norms.

One of the essential elements to transformation of the judiciary in the South African context is the issue of representivity. Historically the South African magistracy was completely unrepresentative in terms of race, gender and language and was accountable only to a white male-dominated minority whilst the 1996 Constitution requires the judiciary to broadly reflect the racial and gender composition of the country (Section 174 (2) of the Constitution of the Republic of South Africa). For the purposes of this research project, a discussion and analysis of representivity on the bench is not included. It is a topic that requires careful treatment and comprehensive research and could in itself form

the subject of a thesis. Given the limits of this mini-thesis and its specific focus on independence, representivity as a topic has not been accommodated.

1.2 Research Objectives

The general aims of this research are to critically explore the transformation process of the South African magistracy and to examine how far the institution has come in aligning itself with internationally accepted standards of independence. More specifically, we will first investigate the status of magistrates prior to 1994 with a specific focus on their relationship to the state, and then consider the changes that have taken place. In this regard the unique opportunity provided by the TRC for the magistracy to examine its role in the past and make suggestions for the future was an important milestone in the early phases of transition to democracy. Examining the magistrates' response to this transitional strategy of truth telling and its possible effect on transformation will thus form the next part of our investigation. That will be followed by an examination of the magistracy's current status in the context of legislative and institutional changes and the final step will be to determine if there are any relevant issues raised through the research process worth pursuing in a more comprehensive future study.

1.3 Research Design and Methodology

The approach to the research project was largely determined by the fact that despite the key role of the magistracy in the legal system, both during apartheid and currently, there has been almost no substantive research or publications on the magistracy in South Africa.

The study could not take the form of a literature study in the absence of substantial literature on the topic. Within the limits of a mini-thesis it also could not take the form of a comprehensive research project. Accordingly, it was

designed as an exploratory pilot project, first reviewing the limited available literature (in Chapter Two), and then initiating a small non-representative set of interviews with such magistrates as were available. The purpose of these interviews was to investigate potential relevant issues which might then be followed up by a more systematic and representative survey.

This study makes no claim to be comprehensive or to provide a representative sample of views and attitudes regarding the transformation of the magistracy. Magistrates' comments on and responses to transformation strategies in the interviews provide little more than anecdotal detail in tracing the path of transformation of the institution.

A mixed methodology was used in conducting the research. Relevant legislation and policy documentation was utilised in order to contextualise the research project. Other sources included oral and written submissions to the TRC as well as a number of documents (minutes of meetings, memoranda and reports) provided by the Magistrates Commission.

The main method of primary data collection was that of in-depth semi-structured interviews with a set of thirteen magistrates from the Western Cape as well as the former homelands of the Transkei and Ciskei in the Eastern Cape who have been in service from before 1994. This group was chosen in order to include both black and white magistrates currently in service who had also been in the magistracy during apartheid.²

The focus of the interviews and questions fell broadly into the following themes:

- (a) The magistracy under apartheid (bias, state interference, discretionary powers etc)

² One magistrate interviewed is from Polokwane. He was included because of his leadership role within the magistracy - he was the president of JOASA at the time of the TRC, is a regional court president, a member of the Magistrates Commission as well as the South African representative on the Commonwealth Magistrates and Judges Association.

(b) The TRC Special Legal Hearings (perceptions and reasons for non-attendance)

(c) Views on transformation of the magistracy.

The interviews were not used to source information about the structural position of the magistracy, but rather as a means to assess individual magistrates' ideas and responses to their environment, both in the past and in the present.

The data set thus consisted of a review and analysis of various relevant documents as well as the responses to the interviews. Data analysis of the interview responses was conducted through content analysis with a focus on identifying and exploring dominant themes and patterns within the categories of data. Some critical analysis of the data was also conducted with a view to bringing out underlying assumptions and implications.

A convenience sampling method was used. This sampling method operates through networks of personal contacts. It is a method in which respondents are selected because their responses can relatively easily be obtained, and is inherently biased and not representative. Because this is a pilot study it was not considered too problematic to use this method of sampling. Although general inferences could not be made about the magistracy as a whole, it created the opportunity to obtain at least a range of anecdotal data for the study. The interviewees included both urban and rural respondents as well as in terms of gender and race: three white males, five black males, one coloured male, two white females and two black females. All but one of the magistrates interviewed had been relocated regionally numerous times and thus collectively they represented a good mix of urban and rural court experiences. It was not possible to interview any regional court magistrates (as distinct from district magistrates) from the apartheid era. There are very few regional court magistrates who are still in service and none could be identified by the researcher who would be

available for a one-on-one interview.³ All the magistrates interviewed are currently in some kind of leadership position within the magistracy: one is a regional court president, three are chief magistrates, five are heads of office, two are regional court magistrates and two are senior magistrates.

Interviews were conducted between January and April 2005 and were conducted face-to-face with the exception of one telephonic interview. Five follow-up interviews were conducted telephonically in May and June 2005. All face-to-face interviews were tape-recorded with the permission of the interviewees. Informed consent was obtained from all the interviewees and confidentiality guaranteed. Ensuring anonymity served to encourage individuals to participate and to facilitate the collection of good quality information. In the text of the thesis pseudonyms have been given to all interviewees, and an attempt has been made to reflect the race and/or cultural background of each with the pseudonym allocated to them.

A standard interview schedule was used to ensure consistency and comparability of data. A fair amount of flexibility was used in the questions and in some instances additional probing was required in order to explore certain issues in more depth.

Magistrates are not a homogenous group and the respondents reflected this diversity in terms of their background and socio-political location in the time-period covered as well as in their attitudes and experiences. Rather than any generalisations an attempt has been made to foreground these divergent experiences in order to highlight their distinctive dilemmas and evasions.

Copies of TRC written submissions and other relevant documents were requested from the TRC Unit in the Department of Justice and Constitutional

³ The lack of magistrates among those interviewed who would have been acting as regional court magistrates under the Apartheid dispensation was especially disappointing because it is these magistrates who would have dealt with the overtly 'political' cases at the time.

Development in Pretoria in September 2004. Despite numerous follow-up phone-calls and emails to the Unit as well as to the Chief Director of the Public Education and Communication Unit, these documents were not received even though repeated assurances were given that they would be provided.

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CHAPTER TWO

LITERATURE REVIEW

The literature on the South African magistracy poses a striking paradox that serves both as a major motivation for and a significant constraint on the present study. As already mentioned in the Introduction, the majority of South Africans come into contact with the justice system through the magistrates' courts and:

it is in the Magistrates' Courts that justice is tested in its most crucial, most pervasive, most voluminous, most pressurized, and logistically most demanding dimensions – in literally thousands of cases every day...the continuous struggle for the legitimacy and the efficacy of the instruments of justice is substantially lost or won in the Magistrates Courts. (Mohamed: 1998:47-48)

It is therefore surprising that whilst a substantial body of literature exists on the judiciary and the higher courts, almost no attention has been paid to the magistracy. The absence of extensive research and publication on such an important institution as the magistracy is a major rationale for this study; at the same time the lack of prior research and available literature cannot but significantly limit this project in turn.

Though a substantial literature on the South African judiciary exists, it is marked by distinctive preoccupations and limitations. Almost all that has been written about the judiciary in South Africa explores issues of bias, human rights concerns and the relationship between justice and law. This indicates that from early on it was especially the complicity of the legal system with the apartheid structures and failures of the courts to act within a human rights framework which were being investigated. By comparison there is relatively little in the literature that deals with more general structural or institutional aspects of the judiciary.

A number of articles have been written on various more specialized aspects of the judicial system, but this review focuses on the six major books that have

been written on the judiciary. These are the works by Sachs (1973), Dugard (1978), Corder (1982), Forsyth (1985), Ellman (1992), and van Blerk (1988). We will briefly deal with each of these in turn. This will be followed by a brief reference to Dyzenhaus (1998) which is specifically concerned with the judiciary's response to the TRC's special legal hearing. We will then touch on two recent research reports on the magistracy by Gready and Kgalema (2000).

Sachs (1973) focuses on race discrimination within the South African legal system and on how the courts were used to regulate racial domination (Sachs, 1973:11). He provides a detailed historical background to the current legal system, which includes some discussion about magistrates. He notes that from the time of Dutch occupation of the Cape from 1652, judges progressed from having no legal training and being in essence the judiciary, executive and legislature all rolled into one to being considered impartial and independent by the time of British colonial rule in the 1800s (Sachs, 1973:32). As well as employing salaried and legally trained judges who brought with them a sense of prestige and independence, the British also replaced the local officials (*landdrost and heemraden*) with resident magistrates in 1827 (Sachs, 1973:50). These magistrates were full-time employees of the Colonial government and were responsible for both numerous administrative tasks as well as judicial tasks. Much like the current situation, most of the criminal and civil trials took place in the magistrates' courts (Sachs, 1973:50). In general magistrates had minimal training and had a tendency to act as both judge and prosecutor in their courts (Sachs, 1973: 52). By the end of the 1800s the situation with the magistracy was in essence the same as it was by 1993: magistrates had no security of tenure and were government employees who were selected, promoted and transferred by the Law Department (Sachs, 1973: 52).

Sachs also briefly discusses the situation of the magistracy in the 1960s, emphasizing again their lack of legal training, lack of independence and tendency to acquiesce to pressure from the Department (Sachs, 1973:158). He mentions

that a text book for magistrates from the training section of the Department of Justice lists 18 characteristics of African witnesses for the benefit of those who 'do not know the Bantu', encourages heavy sentences in political trials and recommends that magistrates don't criticize the police or legislation (Sachs, 1973:159).

Sachs' writing exposes the long history of the magistracy's close association with the executive and lack of independence as well as their lower status with regards judicial prestige, particularly through their lack of legal training. The main thrust of his book though is an analysis of judicial conduct and attitudes and he concludes in much the same way as later authors on the judiciary with regards their relationship to the executive. He discussed an increase in court action in the 1950s which aimed at restraining government. A notable case in this respect was that of the judiciary preventing Parliament from ignoring entrenched clauses in the South Africa Act in an attempt to remove the coloured vote in the Cape (Sachs, 1973:248). Up until the early 1960s, various other decisions (especially the acquittal of the accused in the Rivonia Treason Trial in 1961) entrenched the judiciaries' reputation for independence (Sachs, 1973:250). But, Sachs argues, from 1963 onwards, with the implementation of security legislation such as the 90 days detention laws, coupled with a growing Afrikanerisation of the bench, there was an increase in executive-mindedness in decision-making with an associated disregard for individual liberty. This trend resulted in the judiciary losing some of its reputation for independence (Sachs, 1973: 258). He concludes that judges allowed the prestige and status associated with their office to be used for the pursuit of injustice (Sachs, 1973:262).

In Human Rights and the South African Legal Order (1978) John Dugard surveys the laws in South Africa that contravened human rights, using the concept of a Bill of Rights as the standard to measure South African legislation. He acknowledges that most cases are in fact heard in the magistrates' courts, and that there had been little focus on their role (Dugard, 1978:280). His

discussion did not focus much on the magistracy except to state that magistrates as civil servants could not be expected to display the same level of legal detachment from the executive as the judges. He perceived the reason critics look to the higher courts and not the magistrates' courts when debating independence and integrity was that because it is these courts that are responsible for the standards of justice dispensed in society and they were considered to be more independent than the magistrates' courts (Dugard, 1978:280).

More specifically Dugard discussed the implications for the judiciary of parliamentary sovereignty in the absence of a formal Bill of Rights so that an overly narrow conception of the rule of law in practice came to mean little more than law and order. He notes that the concept of the rule of law was distorted in South Africa in that there was a general failure to acknowledge the unacceptable nature of arbitrary government action and no attempt was made to include the principle of equality before the law (Dugard, 1978:42).

Dugard considered that most of the judiciary followed the principle of legal positivism which implies that there is no inherent connection between law and morality or justice. Positivism is based on the assumption that judges in their decisions only need to apply the law as determined by the legislature and should not be evaluated as to how they satisfy the concepts of justice, the rule of law or democracy (Dugard, 1978: 395). In particular he noted that, in line with legal positivism, the courts were consistently prepared to implement statutory law made by parliament even at the expense of human rights. He argued that by following the approach of legal positivism judges were prevented from understanding that they had choices when deciding difficult matters of statutory interpretation (Dugard, 1978:393). He concluded that all those involved in the apartheid legal order, such as judges, magistrates, prosecutors and attorneys, could not avoid being contaminated by the system and that the majority passively acquiesced with the system (Dugard, 1978: 391). Dugard's work showed that

through a distorted view of the rule of law; a consistent following of the principle of legal positivism and despite the higher courts reputation for independence, the 'legal system fails to measure up to the requirements of a modern democratic society' (Dugard, 1978:49).

In Judges at Work (1982) Hugh Corder researches the role and the attitudes of the South African Appellate judiciary between 1910 and 1950. His research revealed that to a large degree the judges submitted to the legislature and that racial prejudice influenced the decisions that they made. At those times when they could have used their discretion they seldom made decisions that favoured social justice and on the whole were conservative in their decision-making. Although he is more concerned with judicial attitudes, Corder also discusses the two main views about independence at that time. The first view was that judges were independent and impartial and that any inequality in the administration of justice was because of discriminatory legislation, which the courts were bound to apply. The second view, was that the judiciary had failed in their role as guardians of justice because of this dominance of legal positivism in the system (Corder, 1982:232). Corder tended towards the second view, and argued that judges were faced with a choice when interpreting law and the facts of a case and that due to judges ignoring the inherent inequalities in the laws and their failure to comprehend the plight of the majority of the accused before them, the standards of justice suffered and with that some of their reputation for independence (Corder, 1982:236).

Forsyth (1985) examines how judges within the Appellate division between 1950 and 1980 responded to the choices and options available to them. He found that in the early years, the court did indeed challenge the executive and legislative authorities on a number of occasions (as mentioned in Sachs' book) but that this was later abandoned and in the late 1950s and 1960s the court attempted to avoid conflict with the executive (Forsyth, 1985: 225).

The issue in the 1950s around the coloured vote (discussed already in relation to Sachs' book), resulted in the cabinet deciding in 1955 to change the composition of the Appellate Division – increasing the quorum for most cases to five from three, except in matters concerning the validity of Acts of Parliament which would require eleven (Forsyth, 1985:15). The underlying assumption of these changes was that in appointing more members to the Appellate Division, the executive could dilute the opposition with regards to the removal of the coloured vote. This 'packing of the Bench' resulted in a strongly worded letter from the judiciary to government as well as serious consideration by the judges of resigning *en mass* (Forsyth, 1985:17). Ultimately it led to a tense relationship between the judiciary and the executive.

By the end of the 1950s, Steyn had been appointed as Chief Justice and this heralded a change in the relationship of the judiciary to the executive (Forsyth, 1985: 30). Steyn had been a civil servant and was strongly conservative, resulting in a relationship with the executive that aimed at avoiding conflict and controversy (Forsyth, 1985: 57). Following the appointment of Steyn, Forsyth argued that the court increasingly avoided playing a role in the protection of individual rights against the state by its interpretation of security and group areas legislation. Forsyth concluded that although the pro-executive stance was not uniform, there were few exceptions to this rule (Forsyth, 1985: 226).

Forsyth did not discuss the matter of this executive-mindedness of the courts in relation to judicial independence in much detail, other than to say that the judiciary's subservience to the executive 'must tend to undermine the courts' independence' (Forsyth, 1985: 226). His approach tended towards an assumption that the formal independence of the courts survived despite the shift to a more executive-minded decision making on the bench (Forsyth, 1985:38).

In a similar vein, Stephen Ellman (1992), in In a Time of Trouble, examined the intersection between law and emergency powers through an investigation of the

Appellate Division during the 1980s. Ellman argued that the Supreme Court had a tradition of judicial independence (Ellman, 1992:7). Although judges were appointed by the government, he observed that not all judges were aligned to the government (Ellman, 1992:227). He argued that the notion of independence was supported by institutional arrangements such as the fact that judges in general were senior counsel who came from the Bar which has a tradition of being liberal and independent; that most judges had already completed much of their professional careers by the time that they were appointed so that, unlike magistrates, promotion was not a compelling concern; and that judges had virtual life tenure once appointed (Ellman, 1992: 227-229).

He noted that, despite the traditions of independence and even though judges had the potential to mitigate the worst excesses of apartheid legislation, during most of the 1986 state of emergency the Appellate Division under Chief Justice Rabie frequently vindicated emergency powers (Ellman, 1992: 113- 114). Rabie's successor, Chief Justice Corbett on the other hand, according to Ellman, demonstrated support for human rights in his decision-making (Ellman, 1992: 142). The book focused on the 'extraordinary law' in a state of emergency, and therefore excluded any analysis of ordinary law. Ellman does briefly acknowledge that the bulk of political trials were held in the magistrates courts whose independence was 'by no means assured' but does not discuss the role of magistrates and their lack of independence in any depth (Ellman, 1992:226).

Adrienne van Blerk (1988) wrote in defence of the judiciary and attempted to refute the criticism of previous researchers. She examined the nature and intensity of criticisms of the judiciary from a historical perspective. Criticism of the judiciary included racial prejudice in sentencing, allegations of acquiescence with the executive in state security matters and that there was political bias in appointments. It also included the fact that the judiciary rarely challenged government policy by speaking out against unjust laws, nor did they really take advantage of the opportunity to exercise choice in decision-making or choosing

resignation. On the whole, van Blerk's work is polemical rather than analytical and concluded that in some cases, criticism was not fair. But she did concede that, on the whole, the judiciary tended towards conservatism and that their performance lacked a commitment to upholding democratic values (Van Blerk, 1988: 163).

Apart from the almost exclusive focus on the judiciary and the lack of any significant account of the magistracy, the literature is marked by major concerns with issues of judicial bias and racial prejudice rather than the underlying structural and institutional issues of judicial independence and separation of powers. At best, the literature touches on the judiciary's executive-mindedness but as a matter of attitudinal approach rather than as a structural issue. This focus has implications when we consider the issue of transformation of the judiciary. The literature concerned with the transformation of the judiciary would consider measures to change the judiciary's attitudes, their executive-minded approach to judging, and their inherent racism on the bench rather than addressing any institutional or structural changes. And in respect of the judges, this approach is not necessarily incorrect. The literature has revealed that the higher courts have a long history of being structurally and procedurally sound as well as internationally respected. But from the little that has been documented about the magistrates, it is clear that more than just an attitudinal transformation was going to be necessary in order to bring the lower courts in line with international standards of independence and impartiality.

At the time of the TRC Special Legal Hearings and since then, most of the literature and commentary around these hearings has focused on the fact that none of the judges appeared in person. Perhaps the most significant writing about the Special Legal Hearings is that by David Dyzenhaus, specifically his book Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order (1998). In this, he discusses the role of judges, lawyers and academics during the time 1960-1994 (the timeframe specified in the

mandate of the TRC for its investigations) and analyses the Special Legal Hearings with a particular focus on the judiciary.

The central theme in his book is the politics of the rule of law. He detailed much the same discussion as the previous authors with respect to the positivist argument used by most judges during apartheid versus the argument that they could have mitigated the worse excesses of apartheid as they had choices; as well as acknowledging their executive-minded approach to decision-making. Dyzenhaus argues that the rule of law and apartheid practices were incompatible and that judges could have confronted the government with a 'rule of law dilemma' (Dyzenhaus, 1998: 159-160). If most judges had applied the law in a way that considered both moral as well as legal values, the government would have had to either reject the rule of law in favour of apartheid, thus choosing a course of lawlessness; or it would have had to subject its administration to the limitations of fundamental legal principles (Dyzenhaus, 1998:159).

Against this backdrop, Dyzenhaus argued that the TRC provided an important opportunity for the judiciary to re-examine the relationship between law and justice (Dyzenhaus, 1998:35). He argued that by not confronting government with the rule of law dilemma, judges were accountable for allowing the unrestrained implementation of apartheid policy and were to some degree responsible for apartheid's legacy. They should therefore have appeared at the Legal Hearings (Dyzenhaus, 1998:160).

Dyzenhaus examined the numerous arguments given by the judiciary in justifying their non-attendance at the hearings. He asserted that their attendance would have imparted a different tone to the hearings, as well as contributed to respect for the law and the judiciary in a fraught emerging democracy (Dyzenhaus, 1998:171). Dyzenhaus explored the concept of independence with reference to the relationship between state, court and individual. He argued that in adjudicating disputes between government and individual, the court's role is to

ensure both parties are afforded equality, thus drawing the line between law and politics (Dyzenhaus, 1998: 172). He suggested that judicial independence 'is a value instrumental to judges' properly performing their role' and that despite the courts' formal independence, judges failed in their duty and for this they should have taken part in the Hearings (Dyzenhaus, 1998:172-173)

Finally Dyzenhaus discussed the opportunity that judges lost to debate important issues such as judicial appointment, the assigning of judges to cases and more generally, the changes needed to other institutions such as the magistracy and legal professions (Dyzenhaus, 1998:174).

The only substantial texts on the magistracy during the transitional phase are two research reports produced by Gready and Kgalema in 2000⁴. Both of these papers were a response to the TRC Legal Hearings and suggest a shift in focus from issues of racism, bias and prejudice in the earlier literature to issues of oversight, accountability and independence. The TRC hearings exposed deficiencies in the lower courts that went beyond the attitudinal concerns highlighted by earlier authors and which demanded further investigation.

The first report, *Magistrates Under Apartheid: A Case Study of Professional Ethics and the Politicization of Justice* (2000) focused on magistrates' experience of overseeing the safeguards and complaints mechanisms for those in detention during apartheid. The report examined this system in the context of magistrates own concepts of independence and the relationship between law and justice (Gready and Kgalema, 2000:3). As well as this, the report provided detail about the structural and institutional position of magistrates during apartheid, noting that their independence was severely compromised due to their status as public servants (Gready and Kgalema, 2000: 7-8). In their analysis of the safeguard system for detainees, Gready and Kgalema, conclude that magistrates presided

⁴ Their research was based on interviews conducted with 24 magistrates and 13 other key informants which took place during August and September 1999.

over a system that was designed to fail – it was a closed collaboration between state and its officials- and due to the way they administered the system, magistrates in fact made it worse (Gready and Kgalema, 2000: 18). The failure of the system was characterized by (i) magistrates' dual obligations to both their employer (the state) and the detainee and their lack of independence as public servants; (ii) magistrates' reports circulated only within the closed-off arena of government employees; and (iii) the fact that magistrates lacked control over the environment in which they worked and did not know what happened in response to their reports (Gready and Kgalema, 2000: 18-19). Magistrates' engagement with the system was characterized by a routinised and bureaucratic approach (Gready and Kgalema, 2000:3).

Gready and Kgalema's research revealed some of the tensions in magistrates own understanding of the concept of independence. The majority of the magistrates interviewed, regarded themselves as independent. In general they understood interference with their independence in the narrow terms of a politician telling them what to do and none of those interviewed claimed to have experienced that kind of interference (Gready and Kgalema, 2000:41). Although magistrates identified inherent structural causes limiting their independence, they claimed it was still possible for an individual to be independent despite these structures (Gready and Kgalema, 2000:41-42). Gready and Kgalema argued that these attitudes should be seen as a retrospective device which enabled magistrates to distance themselves from the apartheid regime, while maintaining individual credibility (Gready and Kgalema, 2000:45).

Gready and Kgalema's second report, Transformation of the Magistracy: Balancing Independence and Accountability in the New Democratic Order (2000), focused on independence and accountability in the context of three case studies: the TRC, the lay assessor system and social context training. The research focused on magistrates' reception of these strategies. It analyzed the nature of independence and accountability with reference to the position of the

magistracy under apartheid and in the post-1990 era (Kgalema and Gready, 2000:2). In the first case study, Gready and Kgalema concluded that attendance at the TRC hearings would have assisted in more effectively transforming the magistracy as an institution (Kgalema and Gready, 2000: 14). The TRC's human rights violations hearings had exposed widespread abuse in the domain of the magistracy, and raised many questions about magisterial accountability which in turn had implications for independence (Kgalema and Gready, 2000:13). They concluded that magistrates needed to acknowledge their past role and to engage with the issue of accountability both in the past and in the present in order to cement their future independence, and had missed an opportunity to do so by not attending the TRC hearings (Kgalema and Gready, 2000:14).

The second case study focused on the lay assessor system which was implemented to increase community involvement in the courts and to ensure that presiding officers had a better understanding of the social circumstances of those appearing before them (Kgalema and Gready, 2000: 15-16). On the whole, magistrates did not have many objections to the system; concerns were raised about the suggestion that lay assessors share power with magistrates in decision-making (Kgalema and Gready, 2000:18). These concerns were raised in the context of the system undermining the status of the courts and independence. Specifically, the argument was that admittance into the profession required specialized training and that it was this training that allowed magistrates to administer justice impartially (Kgalema and Gready, 2000:18). The arguments failed to acknowledge the history of the magistracy in terms of its lack of institutional independence and also overlooked the racial and cultural divides that undermine the context in which magistrates have to apply the law (Kgalema and Gready, 2000:19).

The final case study investigated social context training which was one of the longer term efforts in sensitizing magistrates to the context of those appearing before them. Gready and Kgalema noted that most magistrates saw social

context training as a successful strategy and one that enhances their legitimacy through their, magistrates, increased accountability to community needs (Kgalema and Gready, 2000: 24).

In conclusion, Gready and Kgalema defined the core challenge to the magistracy as the need to legitimise judicial officers as well as the institution through accountability without losing judicial independence and that the three strategies identified in the case studies were a positive step in this direction (Kgalema and Gready, 2000: 24). The study suggested that magistrates still required significant engagement with the issues of independence and accountability in order to achieve full professional transformation (Kgalema and Gready, 2000:25).

Overall, the later literature begins to reveal that significant structural and institutional shifts were necessary in order for the magistracy to legitimise itself as an independent judicial institution. It also reveals a culture of denial on many important aspects of transformation amongst magistrates such as the need to recognise and acknowledge the magistracy's role in the past, the issue of independence (and lack thereof in the past) as well as the establishment of appropriate mechanisms for accountability.

CHAPTER THREE

TRANSFORMING THE MAGISTRACY: THE APARTHEID LEGACY AND THE REFORMS OF THE 1990s

In this chapter we explore the institutional location of the magistracy during the apartheid years with a specific focus on their relationship to the executive and the impact that this had on their independence. This structural description is followed by a more specific description of magistrates' own experiences and perceptions. The dearth of relevant research and publications as surveyed in Chapter 2 has resulted in a reliance primarily on the limited interview data. This data has inherent limitations; it is often impressionistic, subjective and anecdotal. In the circumstances we have no choice but to use it, although with due care and qualifications. The magistrates' experiences are then located within the wider socio-political context of the time, with reference to the increasing impact of security measures implemented by the state. The chapter concludes with a discussion of the various legislative and other reforms introduced in the early 1990s and the implications of these for magistrates' independence in the new democratic order.

3.1 Magistrates under Apartheid

The use of a *landdrost's* court dates back to the 1600s with the arrival of the Dutch settlers and magistrates' courts were first introduced in the Cape Colony in 1827 (Hahlo and Kahn, 1960:206). Magistrates' courts were introduced in Natal in 1846 and in the Orange Free State and Transvaal in 1902 (Hahlo and Kahn, 1960: 223, 239 and 247). The magistrates replaced the *landdrost*, and were employed by the colonial government, performing both judicial and administrative functions (Sachs, 1973:50). Each colony had its own legislation for the functioning and jurisdiction of the magistrates' courts (Hoexter Commission, 1983: 258). Throughout the 1800s there were already complaints about the lack of formal legal education of magistrates, their dual obligations of both judicial and

administrative work and the 'suspicion of dependence on government goodwill this entailed' (Hahlo and Kahn, 1960: 216). There were calls for reforms which included the removal of administrative tasks from the magistracy and that magistrates, at least in the larger towns, should be drawn from the ranks of practicing advocates and attorneys (Hahlo and Kahn, 1960: 216).

The situation of the magistracy remained relatively unchanged following the Union of South Africa in 1910. The Magistrates Courts Act which was passed in 1917 entrenched a uniform model for the whole country. A new Act in 1944 changed almost nothing and the only major change was the introduction of regional courts in 1957 (Hahlo and Kahn, 1960: 270). The minimum qualification for a magistrate was the passing of the Public Service Law Exam and magistrates continued with the dual functions of judicial and administrative work (Hahlo and Kahn, 1960: 273-274). In the years that followed the passing of the Act, the principle of the separation of judicial and administrative functions was repeatedly raised in the House of Assembly (Hoexter Commission, 1983: 258).

The literature reviewed in Chapter 2 shows that there was a clear distinction between the lower and the higher courts and that, unlike magistrates, judges were considered independent from early in the 1800s. The Constitution of the Union recognized the formal separation of powers between the three arms of government and the South Africa Act of 1909 ensured judges' appointment for life on the bench (this changed to the age of 70 years in 1912), as well as guaranteeing that removal from the bench for incapacity or misbehaviour could be implemented only by the President upon address of both houses of Parliament in the same session. To date, no judge has been dismissed in South Africa (Hahlo and Kahn, 1960:264). As the literature reviewed in Chapter 2 reveals, concerns about the judges leaned towards criticism of their political orientation or attitudes, rather than their structural position.

3.1.1 The Institutional Location of the Magistracy and its Effect on Independence

The location of the magistracy under apartheid can be characterized in terms of the relevant legislation. Thus magistrates were appointed by the Minister of Justice in terms of section 9 of the Magistrates Court Act 32 of 1944. In addition, they fell under the Public Service Act 54 of 1957. This Act contained provisions that included the regulation of conditions and periods of service, retirement, remuneration, discipline, transfers, promotions and dismissal of magistrates. The provisions of the Public Service Act thus placed magistrates clearly within the domain of the executive and had consequences for their independence and ability to preside with impartiality in court.

The institutional location of the magistracy in relation to the Justice Department meant that magistrates were subject to administrative oversight and disciplinary control within this bureaucratic hierarchy. The Department of Justice included a National Inspection Services Division which was responsible for assessing magistrates for merit awards, promotions and salary increases, and which could recommend their transfer without their consent (i.e. the inspectorate was responsible for enforcing Public Service conditions) (Gready and Kgalema, 2000: 8). Possible departmental inquiry by the executive for 'misconduct' was provided for in Section 17 of the Public Service Act and such conduct included '[a]ny act which is prejudicial to the administration, discipline or efficiency of any department, office or institution of the government'; 'publicly commenting on the administration of any department' as well as disobeying a 'lawful order given by a person having authority to give it'. Misconduct inquiries were presided over by other civil servants (usually magistrates) of a higher rank. If found guilty of misconduct, a magistrate could be warned, have his salary or grade reduced or be discharged.

The magistracy was not only institutionally located within the executive administration but its functions also included a mix of judicial and administrative responsibilities. Magistrates performed both legal and administrative duties especially in the rural areas. According to the TRC submission of Director-General Noeth of the Department of Justice they were required to perform 'a great variety of quasi-judicial and administrative functions...on behalf of government departments which had no representation in specific communities'. These tasks included managing applications for state pensions and grants, marriages, overseeing elections, determination of cases in need of care, granting of citizenship, functions relating to taxes and stamp duty and so on (Noeth, 1997: 9,10). The magistrate was usually also the chairperson of the agricultural credit committee, licensing board, rent control board and industrial school in his/her district (Department of Justice, 1998: 41). All of this had major implications for perceptions of their institutional independence, but was not identified as problematic at the time by the Department of Justice. In fact, the Department of Justice's annual report for July 1989-June 1990 stated that '[the magistrate] is often regarded by the community as the senior representative of the State in the rural areas' (Department of Justice, 1990: 58).

The implications of this fusion of administrative and judicial functions for perceptions of the lack of independence of the magistracy were exacerbated under apartheid. The lower courts were responsible for dealing with many of the laws that entrenched the systematic discrimination of apartheid such as the pass laws, riotous assembly and influx control laws, granting of detention without trial, and overseeing the complaints and safeguard system in relation to political detainees.⁵ Magistrates were required to record confessions, visit detainees as well as preside over inquests of custodial deaths (Gready and Kgalema, 2000: 3). The political overtones and potential government interest in these kinds of matters would have made their impartiality questionable given their status as

⁵ For a detailed discussion on the role of magistrates within the complaints and safeguard system, see Gready and Kgalema, 2000: 'Magistrates under Apartheid: a case study of professional ethics and the politicization of justice'

public servants. A 1991 report by the Law Commission highlighted these concerns stating that criticism in these kinds of cases existed 'often simply because magistrates are civil servants' and that their status created an 'outward impression that they are political tools in the hands of government'. The report concludes that this seriously impaired the image of the administration of justice in South Africa (Law Commission, 1991: 200).

At higher levels, too, the institutional location of the magistracy under apartheid proved problematic. The Magistrates Court Amendment Act of 1952 provided for the establishment of regional courts, which had wide powers and greater jurisdiction than the district courts. In an attempt to bolster the status of the magistracy at this senior level, magistrates had to meet special academic and professional qualifications. Incumbents of these posts were to hold an LLB degree or a Civil Service Higher Law Certificate and to have had at least ten years of service, making them the 'elite'. District court magistrates were required only to have a B.Juris or Civil Service Law Certificate. However, since the regional courts were responsible for dealing with the majority of the political trials that took place in the 1970s till the early 1990s they proved especially controversial, increasingly becoming the objects of political protest.

Despite its notional 'independence', the position of the magistracy in the homelands did not differ significantly from that in the Republic.⁶ The appointment and conditions of service of magistrates in the former homelands, such as the Transkei and Ciskei, mirrored those of their counterparts in the Republic almost exactly (TRC Report Vol 1, 1998:479). Moreover, political conditions in the Republic were largely replicated in the homelands - for example, they had similar security legislation providing for detention without trial, and declared states of emergencies at much the same time as in the Republic. Despite the homelands policy, their administration of justice remained closely tied to the South African state. The homeland police forces were subject to significant control by the South

⁶ Availability of the legislation of the former homelands is limited. See TRC Report Vol 1 p 478.

African Police (SAP) and core members from the SAP were drafted into the homeland police. The security police in the Republic also moved freely across borders in the execution of their duties (Rauch, 2000:1) Staff from the Department of Justice in the Republic were occasionally seconded to the homelands as well (Department of Justice, 1998: 29).

In short, the overall picture of the institutional location of the magistracy shows a systematic fusion of administrative and judicial functions under the control of the executive branch of government. Structurally this pre-empted the possible independent function of the magistracy, the consequences of which were further exacerbated by the important and highly visible role of the magistracy in the implementation of apartheid and security legislation.

3.1.2 Experience and Perceptions of Magistrates under Apartheid

In the previous sub-section we provided a basic institutional and structural account of the location of the magistracy under apartheid. This needs to be complemented by a more concrete description of the actual experience and perceptions of magistrates of the functioning of the magistracy during this period. The problem, as we saw in the literature review of Chapter 2, is that there is a great lack of relevant research, documentation and publications. In the circumstances we can only begin to fill this gap by drawing on the limited number of interviews with magistrates conducted for the purposes of this pilot study. While this can have no pretence at comprehensiveness or representativity it may nevertheless be helpful in filling out the picture in more particular terms. In order to protect their confidentiality, each interviewee was assigned a pseudonym. An attempt has been made to reflect the race and/or cultural background of each person with the pseudonym assigned to them.

In various ways the magistrates who were interviewed confirmed that, certainly in their recollections and perceptions, their independence had been compromised.

The interviews also provide some indications as to how government had ensured that they were a functional part of the apartheid state machinery. This is the response by Magistrate 'Smith' on the issue of the independence of the magistracy under apartheid:

There was lots of stuff. We were told we weren't allowed to criticise any state organs, so if the police did a bad job, you weren't allowed to say they'd done an appalling job and to get their act together...that kind of control (Interview with 'Smith').

Magistrate 'Brown' remembered being sent a directive from the Department of Justice in the 1970s that they were never to criticise the police from the Bench (Interview with 'Brown'). The former Director-General of the Department of Justice, Jasper Noeth, confirmed this practice in his oral submission to the TRC with reference to a departmental code of conduct:

'[T]he code stated that magistrates shouldn't criticize police in open court. They should rather direct their criticisms afterwards to the minister of police or the commissioner of police, whoever it was' (Director-General Noeth's oral submission to the TRC).

This 'code' was adopted under Section 17 of the Public Service Act referred to on page 27 and implied a sanction for possible misconduct if ignored. A number of magistrates interviewed stated in different ways that the Chief Magistrates 'sorted out any *verlig* (liberal) magistrates' (Magistrate 'Lombard') or 'tended to interfere' (Magistrate 'Dlamini') or reprimanded them for making decisions they didn't like - for example Magistrate 'de Wet' mentioned that if he turned down police applications for detention without trial, he often received a call from the Chief Magistrate berating him for 'making the work of the police difficult for them' (Interview with 'de Wet'). However, it also becomes clear that magistrates sometimes were not only civil servants by law, but also willing implementers and supporters of the policies of the day. They needed to support the official policy and to toe the party line if they wanted to be promoted and their independence was therefore clearly compromised.

In general, the interviews with the magistrates reflected a pervasive sense of control which permeated their daily experiences. In this connection the Departmental Inspectorate was perceived as playing a vital role through imposing transferrals and other sanctions. Magistrate 'Lombard' spoke about this as a general 'policy': if magistrates acted in a way that displeased the Department they would often receive a telegram giving them one month's notice that they were being transferred to another office (Interview with 'Lombard'). Magistrate 'Smith' echoed similar sentiments: '[c]ertainly it was a known thing that, if you offended the powers that be, you would be transferred' (Interview with 'Smith').

All magistrates interviewed who had been based in the Republic seemed in agreement that the Inspectorate was a means by which the Department kept control over them. The only exceptions were the two magistrates who at some stage in their careers had been a part of the Inspectorate. The common perception of other magistrates was articulated by Magistrates 'Brown' and 'de Wet':

'They [i.e. the Inspectorate] were the Gestapo of the Department...They were terrible...They went to Pretoria where they train you how to lose your sense of humanity...and to become a monster' (Interview with 'de Wet').

'They struck terror into us...they were ruthless' (Interview with 'Brown').

Magistrates from the former homelands seemed not to have had the same perception of the role of the Inspectorate presumably because the Inspectorate did not cover their areas and the homelands did not appear to have had their own Inspectorate divisions.

Magistrate 'Lombard' vividly recalled the sometimes uncomfortable consequences of the closeness between the executive and the magistrates. His account of an incident involving the anti-apartheid leader Allen Boesak may be cited at some length for what it reveals of the nature of the interaction between judicial and security officials in the apartheid era:

It was then in 1982...83, I think. That time when Boesak was arrested. The Attorney-General called to tell me that he [Boesak] would be appearing at my court. I was in Malmesbury then.⁷ A team of us there in Malmesbury worked on the case and we decided that his bail conditions could be changed and that he could be given back his passport and his money. But now this was all before going to the court in the morning. And then early, before court had started the other magistrate, my colleague, he got a phone call from the Minister of Justice asking him what the judgement would be. And he told him. My colleague, he told him *before* we had even gone to court. And so when Boesak got back to Cape Town later that morning, the Minister had got the, what were they then...Internal Affairs...whatever...the Home Affairs guys...to wait for him, so as soon as he arrived they took his passport away again (Interview with 'Lombard').

Lombard's account of this incident may serve as a model case of political interference by the executive and the security officials in the outcome of judicial processes at the time. Significantly it also indicates some measure of conflicting interests and objectives between the local magistracy and their administrative superiors with Magistrate 'Lombard', at least in retrospect, was well aware of the problematic nature of such executive interference. If there was little or no attempt by the magistracy to assert their independence from the apartheid government, there was also no attempt to justify the interference they experienced which was evidently perceived as improper.

'De Wet's' experience also indicates the ways in which the law *could* be used by magistrates prepared to mitigate some of the excess of apartheid policy. He states:

I made it very difficult for them [the police] to succeed with an application [for detention without trial]. That was the only way that I could...resist within the boundaries of what was placed before me...because there is only one little section in the Act which said 'you have to satisfy the

⁷ Political cases in the Western Cape were often heard in magistrates' courts in one of the smaller towns outside of Cape Town in order to make it more difficult for supporters and activists to attend the trial.

magistrate' and then of course I would go through the papers with a fine toothcomb...I would look for mistakes and I would look for something that would not justify the application (Interview with 'de Wet').

The experiential data as expressed by magistrates themselves supports the problematic location of the magistracy within the realm of the executive as well as the associated implications for independence. But in order to understand why magistrates generally seemed so willing to acquiesce to executive control, it is important also to understand the wider socio-political context of South African society at the time.

3.1.3 The socio-political context

In important ways the functioning of the magistracy as part of the apartheid state was tied up with the politics of Afrikaner Nationalism. Adam & Giliomee have described the rise of Afrikaner nationalism based on the mobilization of ethnic power involving a range of cultural, economic and political associations including coordinating secret societies such as the Afrikaner Broederbond (Adam & Giliomee, 1979). After 1948, when the National Party came into power, state patronage was systematically used in a process which Seegers has termed the "Afrikanerisation of the South African state" (Seegers, 1993). Amongst other things this involved a gradual trend of filling key positions within the state with nationalist-minded Afrikaners so that by the 1970s major positions and institutions within the state were dominated by Afrikaners. This amounted to using the public service as a means to provide Afrikaners with employment and skills rather than as a means to develop a civically-minded sector in the Western European manner (Seegers, 1993: 478). In practice this also meant that access to, and promotion in, state bureaucracies such as the magistracy became closely associated with membership of Afrikaner social and cultural institutions including the Broederbond.

Formed in 1918, the Broederbond's core goal was to further Afrikaner nationalism by protecting Afrikaner culture, developing an Afrikaner economy, and gaining control of the South African government (O'Meara, 1983: 59, 61). The Broederbond had different roles and significance at different stages of its history but after 1948 it increasingly functioned as a crucial clearing house and informal dispenser of patronage under the National Party government. By the 1960s and 1970s the Broederbond's membership was considered to represent the elite of the Afrikaner social and cultural leadership and included the vast majority of the National Party cabinet ministers and parliamentarians (Serfontein, 1979: 13). The membership lists provided by Serfontein in his book significantly include the names of a number of magistrates. The interviews conducted by Gready and Kgalema confirm the strong influence of the Broederbond amongst magistrates themselves. One interviewee stated that most members of the Ministry of Justice were members of the Broederbond and that membership was a prerequisite for becoming a Chief Magistrate (Kgalema and Gready, 2000: 8).

The role of the Broederbond in "Afrikanerising" the magistracy along particular political and ideological lines is reflected in the responses of the magistrates interviewed for this thesis project. Thus magistrate 'De Wet's' experience as a liberal white Afrikaner indicates the pressures on Afrikaners to conform with the ruling ideology and the potential exclusion for failing to do so:

...and then you know of course the Broederbond made no secret of it that you won't come in with us if you don't do what we want you to do. I was approached about three or four times to become a Broederbonder but I didn't qualify because I didn't do what they expected me to do (Interview with 'de Wet').

Non-Afrikaners, too, were well aware of the Broederbond's significance.

Interviewees' experiences reflect some of these trends. Magistrate 'Bikitsha' stated that:

As far as I know, almost everybody up there [Pretoria] were members of the Broederbond and you kept this in mind. You knew that your decisions

weren't based on the law but that they were guided by 'the Policy'
(Interview with 'Bikitsha').

Mr Lee Bozalek in an oral submission to the TRC also mentioned the perceived link between Broederbond membership and high ranking positions within the magistracy:

[a] book called the Super Afrikaners...a list of Broederbond members which they listed as an appendix and there I found the names of two Regional Court magistrates...I also have little doubt that their membership of the Broederbond was directly linked to... their appointment as Regional Magistrates (Oral submission to the TRC Special Legal Hearings, Lee Bozalek).

This generalised perception is further supported by JOASA (the Judicial Officers Association of South Africa) in its written submission to the TRC in which it states that 'some judicial officers belonged to both covert and overt formations that were known to toe some political line' (JOASA, 1998:7). It goes on to list some seven examples of organizations including the Broederbond. For our purposes the point is not so much whether such statements can provide any conclusive evidence regarding the much-contested activities of a secret society like the Broederbond but rather that they act as testimony expressing perceptions of the socially and politically compromised position of the magistracy.

It should be stressed that such pressures on the magistracy did not emanate from the Broederbond only, but was part and parcel of the general social and political context of white and Afrikaner society under apartheid. Magistrate 'de Wet' described the racist social context in which he operated (in a small, predominantly Afrikaans town) indicating the social sanctions placed on those who did not abide by the prevailing norms:

It was very difficult for me and I never discussed it with any of my colleagues...but I always felt that if you would punish a black person or a coloured severely, people would jump up and say you're the best. If a white person appeared before you, they'd expect you to release him on

warning. They expect you to wipe his nose with a double-ply twinsaver, pat him on the back and say: look guy this isn't right but don't do it next time. I remember that I had to sentence a guy for assault, a white farmer, who assaulted one of his labourers and the next morning when I got up...there was a box with a chicken pulled into pieces lying outside my door with all sorts of broken knife blades, half a sickle, those kinds of things (Interview with 'de Wet').

As a liberal Afrikaner who did not always behave 'as expected' in the racist context of the apartheid social and legal order, Magistrate 'de Wet' recalled another telling episode which brought him in conflict with the security police:

Yes, I was visited...the [now] honourable Judge Sandi in the Eastern Cape division...He was one of the first black attorneys to appear in my court. We were experiencing temperatures of minus 15 in the winter...My office was the only one with a little anthracite fire in the corner. So I invited him into my office and he refused at first, he said 'I can't come in here'. So then I said to him 'I don't give a damn about the system this is human stuff we are talking. We are both qualified in the law'...and I invited him into my office and he wouldn't sit at first and said 'I can't sit on your chair' and I said 'it's your choice if you sit on my chair...look, I promise you I won't come and look to see if your colour is left behind on my chair' and we laughed about that. I offered him tea and he said 'I can't drink tea out of your cup' and I said to him 'Mr Sandi please, you have to'. When he left...that was a Thursday...the Friday morning...there was a knock on the window...my office was right next to the main entrance and when I looked up I realised there was a police car standing opposite the street...Two guys from the security police they flipped their I.D. cards to me, I couldn't see it, it was quick. 'We are from the security police and we believe that you, you support the blacks, the black people'. And I said 'how did you arrive at that?' 'Well, you know we received a call that you entertained a black attorney in your office giving him tea and stuff'. I said 'look it's my

choice, he's a qualified man...and I called him in because it was bitter cold outside' (Interview with 'de Wet').

Magistrate 'de Wet's' account provides an extreme instance of the force of racist social prejudices and practices under apartheid to the extent that deviations from the racist norms were perceived as security threats. Significantly his account also provides some testimony of the countervailing influence of human and professional solidarity at the height of apartheid.

3.1.4 The increasing impact of the security context

From the mid-1970s and in response to the "Total Onslaught" on white South Africa and the apartheid order there was an increased militarism in state decision-making, management and policies. Under P.W. Botha the militarization of the South African state culminated in the 1980s in the National Security Management System (NSMS) which was a 'hierarchy of committees overseeing bureaucratic work from the highest to the lowest echelons (Seegers, 1993: 478). The "securocrats" became increasingly powerful in the management of the state at all levels, with significant impact on the magistracy as well. Although magistrates were not formally represented on these committees at national or local level, there were informal contacts between the judiciary and members of these committees – specifically the military intelligence sector and the police. This contact often centred on the treatment of political detainees (Seegers: email to the researcher: 22/7/2005).

A notorious instance of this kind of pressure exerted by the security authorities on the magistracy occurred in 1985 when magistrates and prosecutors in Durban attended a meeting at police headquarters where the security police gave briefings and showed video clips on political unrest. The videos apparently showed death scenes, pictures of explosives and maps of trouble spots in an

orchestrated attempt to inform the courts on what 'was really happening in the country' (Haysom et al, 1986:122).

Significantly, the judiciary actually objected to this as improper interference with the integrity of the judicial process in the magistrates' courts. Following public reports of the meeting, the Judge President of Natal recommended that the thirty or so magistrates who had attended should not preside at trials and hearings in 'unrest' cases. It was not the content of the programme that concerned the Judge, but rather the presentation of opinions of police officers as fact that he objected to (Haysom et al, 1986:122).

The interviews conducted with magistrates from the apartheid period reflect pervasive pressures from the security forces going back to the period before the National Security Management System (NSMS). Thus magistrate 'Lombard' told of attempts by the security police to recruit him as an informer:

I was an acting magistrate then, but also in my first year of studies...that time when I was in Groot Marico. The security police came to me and made me an offer. They made me an offer that I could go to Wits and that they would pay all my expenses so long as I would promise to try and infiltrate all the organizations. You know the ones with the '*verligtes*' [liberals] and the anti-government ones. But I refused (Interview with 'Lombard').

It seems unlikely that this 'offer' was a once-off event given the revelations at the TRC of the extent to which the security forces made use of informers to infiltrate anti-government organizations and activities (TRC Report Vol 2, 1998:137,141,386). Lombard's statement raises the question of possible other cases of magistrates taking up such offers which would clearly have had an impact on their impartiality on the bench at a later stage. 'Lombard' gave a second example illustrating the thrust of security police intervention in ongoing cases:

Another time, it was also when I was at Groot Marico, it was then when they kept the 'terrorists' in that 90 days detention. It was maybe around 1972, I think. And they had a guy there and I took his confession. Later, the next day or so, the security police called me and asked me if I would redraft the confession. What they had done, they had deleted parts of that confession and then wanted me to rewrite it for court (Interview with 'Lombard').

The role of the security police in intimidating magistrates who did not toe the line was also reported by a number of the black magistrates interviewed. Their accounts reflect the blurred lines of authority between the magistracy in the homelands and other state organs such as the security police in the Republic. Magistrate 'Dlamini' stated:

Yes, there was overt state interference...your decisions were questioned. The executive was definitely not hesitant to get into the arena. I personally had a confrontation with the then agents from BOSS [security forces] during that time of the upheavals over the country. At that time, most of those who were arrested, the black youths who were arrested and whose injuries [by the police] were on record, they were just dismissed by the whites. But we, most of the black magistrates at the time, we were proactive and we did give such people a chance. So things like to exercise the right to legal representation, medical assistance and for placing on record their injuries. For that, one attracted a visit from the security police (Interview with 'Dlamini').

Magistrate 'Dyosi' echoed this experience of visits and intimidation by the security police:

Of course there was state interference. In one case, I remember I was still a prosecutor and it was a case with youths...students... and they were acquitted and then after this two security branch guys were waiting and they asked me why were they acquitted and they threatened me...we know who you are...we know where you are from...we are watching you.

And then, I mean, it wasn't even me, the prosecutor, who made the decision. It was the magistrate who acquitted them (Interview with 'Dyosi'). Magistrate 'Bikitsha' recounted that when he was a prosecutor he had been identified as an activist and that

you knew that people were spying...one would be careful...of your movements...of everything. It was a very stressful situation. You knew someone was watching you (Interview with 'Bikitsha').

Magistrate 'Dyosi' also spoke of being detained and imprisoned as an activist when she was a young prosecutor and how she felt the security forces were always watching her after that. Her explanation of intimidation perhaps speaks best of the way in which government worked at ensuring that the homeland courts were compliant with government policy:

By the time you were a magistrate, the interference, you could say was more indirect. Because by then they had built on your fear that they had built into you as a prosecutor. So by the time you were a magistrate you were afraid to make any decision that was against the government (Interview with 'Dyosi').

The experience of black magistrates brings with it intrinsic complexities and problems for the sake of analysis. On the one hand, it could indicate that black magistrates were subject to more coercive and direct pressures from the state than their white colleagues, yet on the other hand it may indicate that we need to make some allowances for self-justifying perspectives especially in light of the problematic 'collaborative' role that black magistrates and prosecutors found themselves in. They have an inherent interest in distancing themselves from these roles both at the time and in retrospect. At the same time, it is possible that some black magistrates may have had personal views at odds with their official roles, or even engaged in dual strategies.

In brief, the magistracy was clearly used as a tool by various arms of the state to reinforce and maintain the apartheid structure. Whether individuals chose to

support such action actively was irrelevant, as the institution and system itself was designed to be a vehicle of state policy. This indicates that, despite concerns that may be raised about individual attitudes and motivations, the key problems with regards the independence of the magistracy were in respect of its structural location and magistrates' institutional roles within those structures. Central to any transformation strategy would have to be significant structural and institutional changes.

3.2 The Magistracy in a New Democratic Order

Significantly, attempts to reform the South African magistracy did not start with the new Constitution or only after 1994. Already in November 1979 the State President appointed a commission of inquiry into the structure and functioning of the courts (the Hoexter Commission) with the broad mandate to 'inquire into the structure and functioning of the courts...and to make recommendations on the efficacy...and on the desirability of changes' (Hoexter Commission:1983:1). It is unclear what precipitated the need for the establishment of the Commission, but it appears to mainly have been intended to investigate the Appellate Division, the desirability of establishing an intermediate court to replace the regional courts and the desirability of establishing a family court and implementing some form of machinery to settle minor civil disputes (Hoexter Commission, 1983:2).

The Commission invited interested people to make representations and sent a questionnaire to judges, advocates, attorneys, magistrates and faculties of law at the universities. It received some 1264 written submissions and 205 oral presentations (Hoexter Commission, 1983: 7).

In reference to the lower courts, the report noted that many of the submissions to the Commission had paid considerable attention to the magistracy's close ties to the executive. These submissions noted that on the grounds of the doctrine of separation of powers alone, there was no justification for staffing the lower courts

with officials of the executive and many objected to the fact that magistrates presided over trials with political overtones in which the government had an interest (Hoexter Commission, 1983: 56-57). The witnesses who appeared before the Commission were almost unanimous in their view that all judicial officers should be independent (Hoexter Commission, 1983: 323).

One strongly worded submission from Judge Didcott of the Natal Provincial Division stated that the relationship between the Department of Justice and the magistracy resulted in incompatible functions with inherent conflicts that harmed the image of justice. He recommended that a strict separation between the Department of Justice and magistracy was to be enforced and that the magistrates' courts become purely judicial in function (Didcott, 1980: 664).⁸

The Commission's own findings echoed Didcott's sentiments, finding that 'magistrates in fact perform certain executive functions which are totally incompatible with the judicial nature of their office' and that this gave rise to 'severe public criticism of the lower courts' (Hoexter Commission, 1983: 57). The report emphasised the lack of necessary safeguards for independence through the fact that: (i) magistrates were transferred without their consent; (ii) they were dependent on merit assessments for promotion and salary increases; (iii) they were liable to departmental inquiry by the executive and, if found guilty of misconduct could have their salaries reduced; and finally that, (iv) their salaries were 'totally inadequate' (Hoexter Commission, 1983: 75-76).

Recommendations from the Commission included the removal of magistrates from public service and the establishment of an advisory body (Hoexter Commission, 1983: 93). This advisory body was to consist of an independent regional court advisory board and an independent district court board made up of competent judicial officers who were to be appointed by the State President

⁸ Copies of the submissions to the Commission were not available at the time of the research project. Judge Didcott's submission was published in an edited form in the South African Law Journal together with a number of other submissions. Didcott's submission was the only one published that made specific reference to the magistracy.

(Hoexter Commission, 1983: 326). The regional board should be chaired by a judge with seven chief regional magistrates as members; whilst the district advisory board should be chaired by a chief regional magistrate with seven chief district magistrates as members (Hoexter Commission, 1983: 342). The boards should deal with all matters pertaining to the appointment, transfer, discipline and discharge of magistrates, advising the executive on these matters. The Department of Justice's only involvement should be to deal with the administration of the courts and to make proposals to the boards about administration and co-ordination (Hoexter Commission, 1983: 344).

Other recommendations included that magistrates' conditions of service should be protected by statute, no magistrate should be transferred without his or her consent and that a LLB should be the minimum academic qualification for entry into the service (Hoexter Commission, 1983: 42-43). The report also noted that, as part of the move towards greater independence, magistrates should be recruited from all racial groups within the private sector (Hoexter Commission, 1983:371).

The Hoexter Commission's report signalled for the first time in an official document, a principled recognition for the need to separate the judicial functions of the magistracy from the sphere of the executive and to increase the professional status of magistrates as judicial officers. The report also shows that an awareness of the need to reform the magistracy was in place long before any attempts at transforming the institution were implemented as part of the transition to democracy. Its proposals were a radical departure from the status quo in suggesting the lower courts be granted complete independence with an autonomous co-ordinating body, as well as recognising the undesirability of a predominately white bench drawn only from the public service.

Thus, as early as the beginning of the 1980s, the Nationalist government was officially made aware of the shortcomings of the structure and functioning of the

magistracy. However, there is little or no indication that anything was done about this. This could be linked to the increased militarisation of the state with its associated security concerns during the 1980s. The Hoexter Commission's recommendations may well have been too radical and egalitarian at a time when the state was deeply concerned with the preserving white domination and Afrikaner control.

The Department of Justice's annual reports for the period 1983 –1992 indicate that no attention was paid to the Commission's concerns about the magistracy's closeness to the executive. The reports do however refer to other recommendations from the Commission that were taken up, such as setting up a committee to investigate the division between the administrative and legal work of magistrates (Department of Justice, 1984: 24), the establishment of a small claims court in 1985 and the establishment of a Rules Board in 1987 (Department of Justice, 1989: 5). The first acknowledgement by the Department of the need for separation of the judiciary from the legislature and executive came in the 1990-1991 annual report in which it was noted that there was a need for a 'clearer' notion of the independence of the bench in order to meet the demands of a constitutional state (Department of Justice, 1991:1). This of course was on the eve of the negotiated settlement for a democratic South Africa. The 1991-1992 annual report noted that the position of the magistracy should be examined with a view to statutorily entrenching magistrates' independence (Department of Justice, 1992:26). The report saw these changes as integral to further constitutional development and in line with both the Hoexter Commission's report as well as more recent recommendations of the Law Commission in its Report on Constitutional Models (Department of Justice, 1992: 26). The Law Commission's report had emphasised that as magistrates were functionaries of the executive 'various matters casting suspicion on their independence can be identified' (Law Commission, 1991:199). The report echoed the concerns of the Hoexter Commission and recommended that, as with the judges, a structure like the Judicial Services Commission should be established, with two chambers so as to

deal with district and regional court magistrates separately, and which would deal with all matters pertaining to the magistracy (Law Commission, 1991: 200).

It is in against this background that the Magistrates Act 90 of 1993 was passed (still under the NP government and prior to the adoption of the new Constitution and establishment of a democratic parliament). It statutorily removed magistrates from the public service and established a new body, the Magistrates Commission, as the responsible authority. The Act served to

provide for the establishment, constitution, objects and functions of a Magistrates Commission; to further regulate the appointment and remuneration of, and vacation of office by, magistrates; to provide that certain conditions of service of magistrates and other judicial officers may be determined by regulation; and to provide for matters in connection therewith (Preamble to the Magistrates Court Act 90 of 1993).

The removal of the magistracy from the public service and the creation of an independent Magistrates Commission by the NP government on the verge of losing its own considerable and long-standing executive powers were perceived as an obvious political ploy. Comments from opposition party politicians during the parliamentary debate at the tabling of the Bill indicated the scepticism with which this proposed statutory change was met:

Why is it that at five minutes to midnight, this government is suddenly charged with giving statutory effect to the independence of the magistracy when in fact it has hedged about that question over the past 10 years with all sorts of reasons...? (AJ Leon) (Hansard 7 June 1993: column 10294).

And again:

Why...as the NP prepares to leave office and hand over the government to a more representative grouping...the minister suddenly finds it essential to give magistrates a statutory protection...from an executive that the NP will no longer control? (DJ Dalling) (Hansard 7 June 1993: column 10310).

Despite these misgivings, the Act was implemented, effectively removing magistrates from the control of the Department of Justice and formally

establishing a Magistrates Commission. Considering that the need for reform had been raised in the public domain some ten years prior to its implementation, it was an Act that could only be received with some ambivalence. But in principle, the removal of the magistracy from the control of the executive had to be welcomed and the establishment of the Magistrates Commission was a step in the right direction.

The Magistrates Commission was established in terms of section 2 of the Act to 'ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against judicial officers in the lower courts take place without favour or prejudice, and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly.' In terms of section 3(1)(a) of the Act, the Commission consisted of ten members who were all designated by judicial officers or the legal profession except for the Chief Director of Justice College and the officer of the Department of Justice designated by the Minister. No politicians were appointed on the Commission. The power of appointment was therefore vested in the professions concerned and not in the executive or legislature.

Section 4 of the Act sets out various objects of the Commission such as to 'ensure no influencing or victimization of judicial officers in the lower courts takes place'. Section 4 also sets out the role of the Commission in attending to grievances of, and complaints against, magistrates, misconduct investigations against magistrates and advising and/or making recommendations to the Minister regarding numerous matters such as appointments of magistrates and regional magistrates, promotions, salaries, legislation etc'. The Commission's role though is only advisory – final decisions rest with the Minister, except in the case of dismissals, which rest with Parliament (after suspension of the magistrate by the Magistrates Commission). Finally, section 4 ensures that the Commission is responsible for upholding the independence of the magistracy and ensuring its proper functioning.

The first meeting of the Commission was held in December 1993. Its membership was all male and almost exclusively white and Afrikaans - there was one Indian member. Meetings were held in Afrikaans. Despite having been a major step in securing the magistracy's independence, the Commission was widely criticised as a conservative body which 'sent out very strong signals, no change' (Fourie, quoted in Kgalema and Gready, 2000: 5). In September 1994 the Commission adopted a resolution to reconstitute itself in order to make it more representative (email to the researcher from the Secretary of the Magistrates Commission 18/10/2004). At the same time, the Interim Constitution which came into effect in 1994 (as well as the final Constitution of 1996) changed the legal order in the country and had inherent transformative ideals which implied that the composition of institutions was going to have to change and the Commission's clear association with the old NP government was incompatible with these ideals (*Van Rooyen* 2002 (8) BCLR 810 (CC) at para 50A-D).

In order to accommodate the resolution, the Magistrates Act was amended in 1996 to allow for changes in its composition and for the new Commission to be appointed for a period of three years, effective from 1 October 1998. The Commission was enlarged to twenty-seven members including a judge as the chairperson, the Minister of Justice (or his or her nominee), eight political representatives, four representatives of the practicing professions, two people involved with the training and education of lawyers and magistrates and five 'fit and proper persons'. The remaining six are representatives of the lower court judiciary. The Commission became more representative in terms of race and gender following these changes but with these changes, it also underwent a shift from having minimal links with the executive to once again being more executive driven. In effect the nomination provisions vest comprehensive control in the hands of the executive. The judge as chairperson, three of the magistrates and the five fit and proper persons are all chosen by the President. The Minister designates the two advocates and two attorneys and the teachers of law. The

politicians are chosen by the National Assembly and the National Council of Provinces. Those from the National Assembly must include two opposition party members, whilst those from the National Council of Provinces require the support of six of the nine provinces (currently the choice of Commissioners rests with the majority party as all nine provinces are governed by the ANC). In 1998, when the new Magistrates Commission came into effect, the alterations to the basis of designation meant that the number of members designated by the executive in the Commission numbered 21 of the 27 members.

This shift may have been a reactionary response to the apparent intentions of the Nationalist government in 1993, but it had implications for the perceived independence of the magistracy. The original selection of members of the Commission was largely in the hands of judicial officers or the legal profession (8 of the 10 members), whilst control was now largely vested in the executive. It was also a shift even further away from the original proposals of the Hoexter and Law Commissions both of which had advocated for far more independent structures that were similar to that of the judges. Concerns about the relative institutional independence of the magistracy following the amendments to the composition of the Commission were raised in a number of fora despite a Constitutional Court ruling in 2002 confirming their institutional independence and debates continue on the topic. These are discussed further in Chapter Five.

Linked to the implementation of the Magistrates Act was the implementation of the Regulations for Judicial Officers in Lower Courts Act of 1993 which came into force in March 1994. At the same time, attention was given to integrating the judiciary from the former homelands. Magistrates in the former homelands were placed under the Magistrates Act by Section 2(1) of the Judicial Matters Amendment Act 85 of 1995 in December 1995 which resulted in an amalgamation of eleven departments of justice and their personnel.

The adoption of the Constitution in 1996 secured the independence of all the courts in a number of ways: section 165(2) states that the courts are independent and subject only to the Constitution and the law; section 165(4) places an obligation on organs of the state, through legislative and other measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness; and, finally, section 174(2) states that the judiciary needs to reflect broadly the racial and gender composition of South Africa and that this must be considered when appointing judicial officers.

Despite these Constitutional principles, and although the newly constituted Magistrates Commission was more representative, a number of provisions within the Act and the Regulations still compromised judicial independence. Amongst these shortcomings were:

- (1) Section 10 allowed for the appointment of magistrates by the Minister of Justice who is a member of the executive
- (2) Section 12 allowed for the determination of salaries by the Minister after consultation with the Public Service Commission
- (3) Section 13(3) (a) (i) allowed the Minister to suspend magistrates for 'misconduct'. The Act does not define misconduct in any detail, but Regulation 25 of the Regulations for Judicial Officers in Lower Courts defines this as including arriving late for work, being absent without leave or refusing to execute a lawful order.
- (4) Regulation 22 allowed for the Director General (a political appointee) to effect the transfer of magistrates with or without their consent.

(Kgalema and Gready, 2000:4)

In addition, there was no clear sense of to whom magistrates were accountable. Independence was needed to give the magistracy legitimacy, but with that, came the need for associated accountability measures. During apartheid as public servants, magistrates were accountable to the executive. The provisions of section 165(2) of the Constitution ("the courts are independent and subject only to the Constitution and the law'), demand that they are now accountable to the

constitution's values and ethos but judicial performance also needs to be subject to certain other accountability mechanisms such as academic and public criticism which constrain their apparent freedom of action in the exercise of their power (Cameron, 1990: 253). Judicial officers are public figures and are accountable to the public. This sentiment is expressed by Constitutional Court Judge Kriegler in his judgement in *S v Mamabolo* (2001 (3) SA 409 (CC) at para 15):

[it is] a constitutional imperative that public office-bearers such as judges [and magistrates] who wield great power...should be accountable to the public who appoint them and pay them. Indeed, if one takes into account that the judiciary, unlike the other two pillars of state are not elected and are not subject to dismissal if voters are unhappy with them, should not judges pre-eminently be subjected to continuous and searching public scrutiny and criticism?

The need for accountability is even stronger in light of the magistracy's past closeness to the executive but by the mid-1990s there were no clear accountability mechanisms in place.

3.3 Concluding remarks

The 1993 Magistrates Act received a mixed response due to its evident political objectives at the time. Its critics believed it was implemented in order to ensure that the new government could not use magistrates to serve their own political ends in the same way that the apartheid government had done, rather than out of any real desire for independence. But these concerns aside, the groundwork had been laid for an independent magistracy. Real independence with a strong associated sense of accountability had not yet been achieved and it was not sufficient yet to signify that there was an accompanying commitment to the principles of independence and accountability. The TRC special legal hearings in 1997 then came at a critical time in the judicial transformation process and created the space for the magistracy to demonstrate both their independence and their accountability to the public.

CHAPTER FOUR

MAGISTRATES AND THE TRUTH AND RECONCILIATION COMMISSION

4.1. Background to the TRC Special Legal Hearing

In 1996 a human rights lawyer, Krish Govender, made a submission at a Victim Hearing of the Truth and Reconciliation Commission (TRC). On the form, under “victim” he wrote “*the South African people*” and under “*nature of violation*”, he wrote “*injustice under the Apartheid judiciary*”. It was this submission that led to the inclusion of Special Legal Hearings in the South African TRC process (Dyzenhaus, 1998: 36).

Although not mandated to investigate the systemic aspects of apartheid oppression in depth, but rather to focus on gross violations of human rights during the apartheid period from 1960 to 1993, the Commission was required by the TRC Act to get as complete a picture as possible of the social context in which the abuses took place (Preamble to the Promotion of National Unity and Reconciliation Act 31 of 1995). The TRC’s Committee on Human Rights Violations organized special hearings addressing different sectors of society such as health, business and the media (Rombouts & Parmentier, 2002: 276). Broadly the hearings were aimed at getting answers to the following questions:

How did so many people, working within so many influential sectors and institutions, react to what was happening around them? Did they know what was happening? If they did not know, or did not believe it was happening, from where did they derive their ignorance or their misunderstanding? Why is it only with hindsight that so many privileged members of society are able to see that what they lived through was a kind of madness and, for those at the receiving end of the system, a kind of hell? (TRC Report Vol 4, 1998: 1)

The special Sectoral Hearings of the TRC were not intended to address particular gross violations of human rights, but rather sought to explain the

political, economic and legal conditions that had made the atrocities possible, and through this to allow various institutions to account for their role in the past. At these hearings the TRC intended to evaluate institutional responsibilities for abuses and to identify the weaknesses within the structures or laws that should be changed to ensure that the past would not be repeated (Hayner, 2001: 29). By doing so, the space was created for institutional transformation to begin.

The Special Legal Hearing was one of these hearings and took place on 27-29 October 1997. Part of the TRC's intentions can be seen as wanting to re-instil in the nation a sense of confidence and belief in the state and its structures. For a judiciary to function properly, it must enjoy the confidence and trust of the community in which it operates. In the words of Kader Asmal, public confidence in the judiciary "reflects far reaching sentiments of belonging, identity and – ultimately – of justice among us all" (foreword in Dyzenhaus, 1998: x) The judiciary's credibility had been severely damaged during the apartheid era and the Legal Hearings provided it with the opportunity to take responsibility and to account for its role during that time and so restore its relationship with society.

Asmal (foreword in Dyzenhaus, 1998: ix) states "the apartheid judiciary has much responsibility to shoulder for the ills of the past – and could have done much to enlighten the country about the inner workings of apartheid's administrative labyrinth." However, as we shall see, the judiciary deliberately and notably failed to make use of this important opportunity to deal with its own complicity with apartheid. By failing to participate effectively in the TRC process, the judiciary failed to rise to the challenge of restoring and expanding public confidence.

Prior to the oral hearings, the TRC sent out invitations to all branches of the legal profession as well as interested civil society groups inviting them to make written submissions on the role played by lawyers between 1960 and 1994. In the invitation, the Commission requested that attention be paid to twelve particular issues. Amongst these were the appointment of members of the judiciary, the

relationship between law and justice, the role of the judiciary in applying security legislation, the exercise of judicial discretion, attempts - if any - to undermine the independence of the judiciary, and racial and gender discrimination within the legal sector. Included was also a request for recommendations on how to transform the legal system to one that reflects a human rights culture and which would address the perception that justice is the domain of a privileged few in South African society (TRC Report Vol 4, 1998: 93-94).

The TRC also indicated that the most important submissions would be summarized orally during the hearing, and the presenters would have specific questions put to them. The idea was to create a different atmosphere from that at the victim or amnesty hearings – that it would be an environment in which representatives from different parts of the old order would come to present their views in a climate of enquiry that would not be confrontational (Dyzenhaus, 1998: 28). The nature and objectives of the hearing were clearly stated:

It is not the purpose of the hearing to establish guilt or hold individuals responsible; the hearing will not be of a judicial or quasi-judicial nature. The hearing is an attempt to understand the role the legal system played in contributing to the violation and/or protection of human rights and to identify institutional changes required to prevent those abuses which occurred from happening again. We urge all judges both serving and retired to present their views as part of the process of moving forward. (TRC report Vol 4, 1998: 95)

4.2 The Judiciary's Response to the TRC Special Legal Hearing

A wide range of organizations and individuals responded with written submissions to the TRC's invitation to participate in the Special Legal Hearing. The response of the judiciary was quite striking in that they almost all refused to participate in any meaningful way. Already in November 1996, before the hearings, the then Chief Justice, M Corbett, on having been invited to comment

on Krish Govender's presentation, made it clear that he was opposed to the process. The manner in which he expressed his comments reflected a basic misunderstanding of the stated purpose of the TRC Special Legal Hearing:

In order to determine whether Judge X had allowed justice to be subverted in some alleged manner in a particular case, the TRC would in effect have to retry the case. ... The mind boggles at what all this would involve. The impracticality of it all is manifest.

(Corbett, 1998: 20)

Chief Justice Corbett stated that he did not speak on behalf of the judiciary as a whole but that he had circulated the memorandum among the Appeal Court judges which "bears their endorsement" (Corbett, 1998:17). His statement continued with an assessment of two particular cases⁹ that had been raised by Krish Govender and concluded that 'the broad picture [of the record of justice] is...a favourable one' (Corbett, 1998:18).

But Corbett had created a tension in his argument that it was impractical to go into specific cases when he himself defended the judiciary in the two specific matters in his memorandum as well as by making a broad claim in defence of the general record of the courts; he undermined his own claim about the impracticality of such evaluation by evaluating the record himself, and moreover did so in a way intended to exonerate the role of the judiciary (Dyzenhaus, 1998: 47). It was Corbett's memorandum that seemed to set the tone for the response of the judiciary as a whole to the invitation of the TRC and the tensions within the memorandum afflicted most of the other judicial submissions (Dyzenhaus, 1998: 54).

Specifically, the judges argued that they should not appear in person at the TRC hearing. The fundamental reason given for this was that they felt that their independence would be compromised if they had to account for their actions, and

⁹ The first case was that of Andrew Zondo who was sentenced to death at the age of 20 for planting a limpet mine and the second case was that of Dimitrio Tsafendas who assassinated Prime Minister Verwoerd in 1969.

it would set a precedent for future commissions. (Boraine, 2000:184). This argument implied that the value of independence in the new democracy would suffer rather than benefit from any discussions at the TRC, suggesting that the record under apartheid had been one of independence (Dyzenhaus, 1998:137). Arguments against the judges' stance are best summed up in the words of Dyzenhaus:

One cannot easily argue that judges' independence will be compromised by asking them to account for their conduct when they are called to account because of conduct which compromised their independence (Dyzenhaus, 1998: 54).

The second argument for not attending the oral hearings was based on collegiality. The judges felt that the fragile relationship between 'old order' and 'new order' judges would be severely damaged and this would affect the process of making the new order workable. The bench at that stage consisted of mostly conservative 'old order' judges, a number of 'liberal old order judges' as well as a few newly appointed judges. Collegiality in this context implied more than just getting along, but also of all judges committing themselves to the values of the new constitutional order (Dyzenhaus, 1998: 38). Both South Africa's most senior judges were distinguished human rights advocates. It was well known that most the old order judges still serving on the Supreme Court of Appeal had formally opposed the appointment (in 1997) of Mahomed (an Indian) as Chief Justice to the Supreme Court of Appeal. Neither Mahomed, nor the president of the Constitutional Court, Arthur Chaskalson, would have been offered an appointment under apartheid. And for either of them to criticise old order judges could have created enormous tensions and risked the rupture of the new collegiality (Dyzenhaus, 1998: 38-39).

The judges' approach to the TRC hearings created the impression that they thought they were above the need for both truth and reconciliation and that there was no need for them to account to the public. As Carol Lewis Dean of the Law

faculty at the University of Witwatersrand argued in her oral submission to the TRC, Parliament, when passing the TRC Act, had not exempted judges from the moral and legal duty to testify (Lewis, in Dyzenhaus, 1998: 47). By placing themselves above the law, judges created the impression that they were not accountable like any other member of society.

4.3 The Magistrates Commission and the TRC Special Legal Hearing

As extraordinary as the judges' refusal to appear in person, was the fact that magistrates simply did not participate in the TRC process in any significant way (except for one written submission prior to the hearing and two oral presentations at the hearing). The Magistrates Commission formally declined to participate because it could not decide whether participation in an investigation would be of any benefit as it was "without clarity" on the exact allegations, the identity of the accused and 'which section of the legal system is accused' (letter to TRC from Magistrates Commission 18/2/1997).

Given the historical background discussed in the previous chapter, and in particular that magistrates had played such an important administrative role in implementing apartheid policy and had been accountable to the state, their presence at the hearing was crucial. At the actual hearing itself critics characterised the role of the magistracy as highly politicised, and much criticism was aimed at them in the hearings. (Gready and Kgalema, 2000: 2). For example, in his oral submission to the TRC Legal Hearing the human rights lawyer Lee Bozalek stated that:

There is no doubt in my mind that there was a very serious political bias in the Magistrates Courts in the years past and this was evidenced to my mind by the relatively uncritical acceptance of police evidence with corresponding scepticism of the evidence given by the accused or his or her witnesses. My experience was in these cases that there was quite a substantial margin of discretion which any magistrate had in a given case

very often relating to issues of credibility and in these cases this discretion was almost always exercised by the magistrate against the accused and in favour of the state (Bozalek oral submission to the TRC legal hearing). Other speakers also stressed the significant absence of the magistracy from the TRC's Legal Hearing:

The big gap in today's proceedings has been the magistrates. They have been hearing hundreds of thousands of cases every year. Hundreds of thousand of people going to jail every year through the magistrates' courts and we haven't heard virtually a word (Professor McQuoid-Mason's oral submission to the TRC legal hearing).

And similarly in the oral submission by NADEL:

...What we mustn't lose sight of, however, is the fact that most of our people's experience of the justice system was predominantly at a lower court level...some of the basic and fundamental violations of the rule of law actually occurred at a magistrates' court level where people were denied their rights to legal representation...where people were not treated with dignity...they were the ones who prosecuted innumerable public violation offences... (NADEL'S oral submission to the TRC legal hearing).

How can the absence of the magistracy from a public hearing to which its role under apartheid was so central be explained? In the light of the letter from the Magistrates Commission already cited it is clear that the absence of the magistrates from the TRC's Special Legal Hearing was not incidental or a matter of oversight. Kgalema and Gready (2000: 9) suggest that the role of the Magistrates Commission in 'orchestrating the response or lack of response from the magistracy [to the TRC] is ... something that requires further investigation and clarification.' An attempt was made to gain clarity from the Magistrates Commission in this regard. A request was made for all documentation (minutes of meetings, letters etc) from that particular time period. It is the gaps in the information received from the Commission that perhaps best reveal what might

have happened during that time. The following is a reconstructed summary of the relevant interaction between the TRC and the Magistrates Commission:

- On 7 February 1997 the TRC sent a letter to the Magistrates Commission noting that a number of victims had made allegations questioning the role of and their treatment by, the legal system and requested suggestions for the format and content of the proposed special legal hearing.
- On 18 February 1997 the Magistrates Commission responded that 'without clarity on the following matters a decision whether participation in an investigation will be of any benefit cannot be reached'. The matters included which section of the legal system was accused, what the allegations were, and who were the accusers and what credibility did they have. This response already seems to indicate an unwillingness to participate – the TRC had not asked for opinion on whether it was appropriate for the hearings to take place or for the Magistrates Commission to decide to participate in the hearings, but rather they had asked for advice into *how* these hearings should take place.
- On 21 August 1997 the TRC responded with another letter, acknowledging the letter of 18 February and stating that 'after giving consideration to your response and others received, the Legal Working Group of the TRC has decided to request submissions from a broad range of role players in the legal system...' It invited the Magistrates Commission to make a submission on the role of the magistracy at the Special Legal Hearings, and asked the Magistrates Commission to inform magistrates (both retired and serving) of the contents of the letter and to 'facilitate the making of submissions to the TRC.'
- On 20 November 1997, *after* the Special Legal Hearings had been held in October, the TRC sent another letter again requesting submissions from the Magistrates Commission. This letter reiterated the purpose of the hearings and the broader TRC purpose and mandate
- On 17 December 1997 the Magistrates Commission responded with a letter claiming that their letter of 18 February had requested clarity on a

number of aspects but since the TRC did not reply to this request, this accounted for their own lack of further communication. In this letter the Magistrates Commission stated that they were prepared to assist the TRC by informing the cluster heads of the contents of the TRC's letters requesting further dissemination. It also stated that it had deputed a member to prepare recommendations on the transformation of the legal system.

- On 4 February 1998 the TRC responded with a letter reminding the Magistrates Commission of its previous letter of 21 August 1997 (and reattaching it) and requested their report, noting that the deadline for the TRC report was 28 February 1998.
- On 6 February 1998 the Magistrate's Commission responded stating that it was unlikely that their report would be ready before the deadline and that it had distributed the letter of 20 November 1997 to all magistrates
- Finally, on 22 May 1998, a submission from the Magistrates Commission was sent, almost a full three months after the requested submission date. A covering letter stated that the Magistrates Commission had not received the letter of 21 August 1997 until the 4th February 1998. It stated further that it had 'not been unwilling to make a submission'.

It is difficult to accept the stated justifications for the Magistrates Commission's belated submission to the TRC at face value. On reflection, it seems unlikely that the letter of 21 August 1997 was not received by the Magistrates Commission. It was both faxed and sent by registered mail. The apparent loss of this letter was not mentioned in the correspondence to the TRC dated 6 February 1998. Yet, in its submission on May 22 it is stated that the TRC's request had not been received until 4 February 1998. Nor is the Commission's excuse that the TRC had not responded to its queries asking for clarification convincing. Although the TRC had not responded directly to these queries, the letter of 21 August had stated quite clearly what the intentions of the hearings were and through its

content had in fact addressed a number of those concerns – most importantly emphasizing that the hearings were not about accusations or establishing guilt.

It also seems peculiar that a request of this nature would not have been discussed at any meetings of the Commission prior to December 1997, given the importance and national media coverage of the TRC hearings and the public debate around the judiciary at that time. Extracts from the Commission's minutes during this time, as well as confirmation of this in an email from the current Secretary, indicate that the TRC matter was only discussed three times: on 11 December 1997, 23 February 1998, and 21 May 1998¹⁰. The extracts of the minutes refer only to the resolution that Professor Lourens du Plessis (a member of the Magistrates Commission) would draft the submission and that the TRC letter should be distributed to all magistrates.

Professor du Plessis was asked in an email by the researcher what he remembered from around this time. He stated that he thought the TRC events had happened after his tenure on the Magistrates Commission. He did not remember that he had written the submission. His lack of memory of his role in the submission would appear to reflect the general lack of serious contemplation that the Magistrates Commission gave the Special Legal Hearings on the whole.

The sequence of events, the gaps in the documentary records and what can only be seen as deliberate stalling tactics lead to the conclusion that the Magistrates Commission played a deliberate and significant role in ensuring that magistrates did not participate in the Special Legal Hearings of the TRC. Not one of the magistrates interviewed remember hearing about, or seeing, any letter sent from the Magistrates Commission informing them that they could make submissions. (The letter, if sent, would have gone to the Chief Magistrates and Cluster Heads

¹⁰ Extracts from only two sets of minutes were received; item 17 of the minutes 11 December 1997 and item 7 of the minutes 21 May 1998. When the researcher queried a reference to item 12.8 mentioned in the second extract (which implied another occasion that the TRC had been discussed) the secretary of the Commission responded that 'it had been mentioned again at a meeting on 23 February 1998'. No extracts or full copies of minutes of any meetings prior to 11 December 1997 were provided to the researcher, so no clarity was gained as to whether the TRC might actually have been discussed prior to December 1997.

who then would have been expected to distribute its content to all magistrates in each office) When, as part of this research, the Magistrates Commission was itself asked for a copy of the letter that they claim to have sent, the response was that the Secretary could not find a copy in the files, but that he did remember that it was 'merely a short covering letter...informing them that they are at liberty to submit submissions or representations directly to the office of the TRC' (email from the Secretary of the Magistrates Commission 20/10/2004).

The submission eventually made by the Magistrates Commission to the TRC reflected a general unwillingness to take responsibility for the magistracy's role under apartheid, or to accept the need for accountability. It does, at first, acknowledge that

'Magistrates were often called upon to actively participate in the execution of oppressive policies – both in their judicial and their administrative capacities. Many of them uncritically deferred to the policy of the government of the day, some probably with enthusiasm...Apartheid was not just a 'system' but an all-pervading ideology that influenced the minds of people at all levels of society, including judicial officers" (Magistrates Commission written submission to the TRC, 1998: 3).

However, the submission goes on to state that 'as civil servants... [magistrates] were often *required* to execute controversial policies *unquestioningly*' (own emphasis) (Magistrates Commission, 1998: 3). This seems to imply that magistrates could not be expected to take responsibility for their actions as these were prescribed by government. This is supported later in the submission when it states

[T]he Magistrates Commission is ready to learn from these failures in order to prevent a *recurrence of governmental abuse of power* (own emphasis) ascribable to the judicial malfunctioning of magistrates.' (Magistrates Commission, 1998: 4)

The implication appears to be that abuses under apartheid were the responsibility of the government, not of the magistracy.

The submission, in its brief four-page entirety, did not move from its brief moment of acknowledgement to one of apology. It avoided making any statement that would require magistrates to be accountable and focused instead on the Magistrates Commission's role in transformation as that of 'inculcating a decided sense of independence with magistrates'. The Commission further defined its role as 'a watchdog jealously guarding the independence of the magistracy' (Magistrates Commission, 1998: 4).

The submission concluded that it 'looks forward to the report of the TRC because that would help it assess the judiciary's failures of the past' (Magistrates Commission, 1998: 4). In the circumstances this assurance can hardly be taken seriously. In effect the Magistrates Commission had significantly contributed to the fact that magistrates did not participate in the hearings in any meaningful way. By submitting its views late to the TRC, the Commission also avoided any real public engagement with the issues surrounding the role of the magistracy during apartheid.

4.4 Magistrates' Perceptions of the TRC Special Legal Hearing

It is against this background that the almost complete absence of magistrates from the TRC's Special Legal Hearing should be considered. Apart from the lack of encouragement by the Magistrates Commission, the magistrates interviewed also claimed that at the time of the TRC there was a climate of fear and intimidation in the magistracy and that they did nothing without approval from their superiors. In Chapter 3 we suggested that the Magistrates Commission members had signaled that in essence there should be 'no change', and it seems magistrates, either willingly or not, complied with this instruction.

Magistrate 'Lombard' stated that 'you wouldn't dare to step out of the boundaries' and magistrate 'Smith' said 'you weren't going to stick your neck out'

(Interviews with 'Lombard' and 'Smith'). In his interview magistrate 'De Wet' corroborated these sentiments:

'If the circular had come, and if the wording was such that it was easy for me to go, I would have gone. Definitely. I would have voiced my concerns. But, on the other side, I was filled with fear. You know with the powers up there [Pretoria], I never knew how strong they were... So I didn't go because I was very afraid. ...I had responsibilities towards my wife and my children. ...There was talk amongst the colleagues that if you open your mouth you're going to get sent out somewhere in the Transkei or the Ciskei where you will be the only white' (Interview with magistrate 'de Wet').

Significantly some of the black magistrates also recalled an atmosphere of reluctance and constraint at the time of the TRC hearing. Magistrate 'Dlamini' stated that

I remember an immediate reluctance from the magistracy to get involved – suddenly 'judicial independence' became an issue and there was tangible resistance. The people in charge were the same people who were involved in some of the issues that were the TRC issues [those about actively supporting or participating in human rights abuses] so it was not a question of personally deciding not to go. ...It was about toeing the line. ... We didn't have the authority to do that (interview with magistrate 'Dlamini').

These statements present an interesting insight in magistrates' engagement with their past and the ongoing transformation of the magistracy. It was, after all by 1997/1998 some 5 years since the necessary legislative changes had been implemented to remove magistrates from the public service; and the Magistrates Commission had been established in 1993 (albeit with a conservative composition at first). Ostensibly then, as independent judicial officers, there was no need to fear the reactions from 'Pretoria'. It may well be that particular individuals who were known supporters of the apartheid government were still in

positions of authority within the magistracy, but the structural changes which had been made at least in principle gave magistrates the 'authority' to participate free from the influence of the Department of Justice.

These comments suggest that, rather than only fear of reprisal from the 'authorities', it was to some extent instead magistrates' own unwillingness to accept any sense of responsibility or accountability that drove their personal decisions not to participate in the TRC. As magistrate 'Smith' said 'you weren't going to stick your neck out' (Interview with magistrate 'Smith') - it was easier to maintain the status quo amongst one's colleagues and remain passive than to engage publicly with the TRC and take on responsibility for the wrongs of the past.

The only attempt by magistrates as a group to participate in the hearings was through a submission made by the Judicial Officers Association of South Africa (JOASA) on behalf of its members. This submission was dated 2 September 1998. Its lateness could be attributed to the delays of the Magistrates Commission's own submission and associated delay in alerting magistrates that they could make submissions. On the other hand, it could also indicate an unwillingness to engage with any confrontations and questions that might have been raised at the forum of the TRC.

Magistrates' retrospective memories in this regard raise some interesting points around the possible suppression of the facts in order to save face and individual credibility but are selective and self-serving. The then president of JOASA described the process around the submission as follows (including the emphasis on the race of individuals): two magistrates (one black and one white) had been mandated to write the submission while the document was signed by the then President of JOASA (who is also black). The submission was handed to the then secretary of JOASA (who is white). The president of JOASA went overseas shortly thereafter and on his return learned that the submission has been

submitted 'late' and that 'although the document finally reached the TRC it 'didn't receive the attention it deserved' and that the 'late' submission was deliberate (fax to the researcher from magistrate 'Mapoi' 24/2/2005). This version of events was confirmed in a telephone conversation with the black author of the submission. Implicit in this statement is a suggestion that it was the old order white magistrates who were unwilling to participate in the TRC hearings. It may be that all of these events did in fact take place, but the emphasis placed on the possible racial undertones in the sequence of events, the apparent 'lateness' of the submission and its role in 'deliberately defeating its cause', is misleading in its claim.

This aside, the JOASA submission noted that 'magistrates were instruments wielded by the authorities in pursuit of apartheid motivated ends' (JOASA submission, 1998 :2). Unlike the Magistrates Commission, they apologized 'unreservedly' for both 'conscious and unconscious acts and omissions by judicial officers at the district level that could have the effect of undermining human rights from time to time' (JOASA submission, 1998: 3). The submission also acknowledged that magistrates were 'influenced by the policies of the government of the day' and that what took place in the past could only have happened in a situation of 'a dire lack of judicial independence' (JOASA submission, 1998: 9). It highlighted particular failures such as the treatment of black people when magistrates implemented pass laws and the like; the magistracy's failure in dealing with detainees, forced confessions and deaths in detention appropriately; and their inappropriate association with politicians, secret and other societies with political leanings and the security forces (JOASA submission, 1998: 6-7). The submission also noted some areas of success: that some magistrates did report abuses of detainees; that they adhered to the rule of law in 'a number of instances'; some applied the law 'free of bias and prejudice' and refused to take orders from politicians (JOASA submission, 1998: 7-8).

The JOASA submission indicated the first real acknowledgement by the magistracy of its role in the past as well as its complete lack of judicial independence. It also confirmed some of the experiences mentioned at the TRC hearings by those who presented oral testimony. It is profoundly unfortunate that its submission almost one year after the legal hearings detracted almost entirely from its potential impact. The submission could have played a significant role in instilling public confidence in the institution through its relatively honest appraisal of its role under apartheid as well as created a platform for magistrates to start grappling with the issues of independence and accountability.

In contrast, magistrates' own reasons for not attending the TRC hearings reflect a disturbing tendency to absolve themselves from any personal complicity or culpability with regards to the apartheid system that they had worked in: "I didn't feel I had anything to air as a magistrate" (Magistrate 'Brown'), 'there was no need to attend personally' (Magistrate 'Mandla'), 'Yes they ...the white magistrates should have gone' (Magistrate 'Ndlovu') and there was '...no need to attend, it had all worked out well for me' (Magistrate 'Groen').

Magistrate 'Brown's response is also interesting in its reflections of her personal justifications for not having to feel responsible for the past. Throughout her interview she asserted that at no stage had she felt that she was not independent: 'my daily experience was one of functioning without fear, without a sign of executive control'. Though we can accept the subjective veracity of her views, her comments raise various troubling questions. Firstly, given the institutional location of the magistracy under the executive controls of the apartheid state, it is not clear to what extent she *could* have functioned independently as a magistrate at the time. Secondly, this must raise the question of possible "denialism" on her part, i.e. that she either does not recognize or alternatively suppresses her complicity as a magistrate with the apartheid system. She was (and is) a member of an institution that has been generally accepted *not* to have been independent from the executive and that was

complicit with the upholding of the apartheid system. Her comment reflects the general avoidance within the magistracy of facing up to their institutional accountability.

As we have seen in Chapter 3 the evidence is that on the whole magistrates under apartheid were politically compliant, content with applying government policy unquestioningly. However, the magistrates interviewed typically justified what they did by creating a moral divide between their own daily work and that of the 'political magistrates' (i.e. the regional court magistrates), thus absolving themselves of culpability as they did not see their work as overtly political. Generally, magistrates' reasons for not attending the TRC hearing echo Magistrate 'de Kock's statement of

'[there was] nothing we could have done. ...That was the law. We couldn't have influenced anything. ...I was part of the system. ...I could have lost my job' (Interview with magistrate 'de Kock').

Another reason for non-attendance was a similar explanation to that given by the judges of 'the need to foster congeniality'. JOASA had only recently been formed and had elected a black magistrate as its first president. Magistrate 'Mapoi' states that he thought it would not have been a good idea to attend 'since we were busy with reconciliation amongst ourselves' (Interview with Magistrate 'Mapoi'). It is not clear how this process of internal 'reconciliation' would have been threatened by participation in the TRC hearing whose general objective was precisely to support and facilitate transformation of this kind.

Magistrate 'Dyosi' seems to be the only magistrate interviewed who grappled with the moral and political implications of her actions. Her reflections seem to voice some of the real reasons for non-attendance by the magistracy

At first I thought, no: this is for the white magistrates, I haven't done anything. Then I realized that I was using the white magistrates as a scapegoat because I couldn't face my own guilt or my complicity...

realized that I wanted to exonerate myself because I had done enough damage by working in the apartheid state and not for my people and there was nothing worth mentioning. For my own selfish reasons I didn't want to expose myself to scrutiny and have people maybe say to me that I was a sell-out (Interview with Magistrate 'Dyosi').

We must conclude that magistrates are indeed to a large degree themselves responsible for not engaging with the TRC. But they cannot be expected to shoulder all the blame. The TRC also has to accept some level of responsibility for the failure of the magistracy to attend the hearings. In this connection the question must be raised as to why the TRC chose going via the Magistrates Commission as the route to seek the participation of magistrates at the Special Legal Hearings. One of the co-ordinators of the TRC Legal Hearings, Ms Melanie Lue-Dugmore, stated in an interview with the researcher that they were instructed by the TRC commissioners to follow protocol and thus to approach the magistrates through the relevant statutory body. However, it was well-known at this time that the Magistrates Commission as then constituted was a controversial body whose membership was almost completely white and conservative. At some level it should have been obvious that it was unlikely that the Magistrates Commission would encourage the magistrates to attend. In its responses to the TRC the Magistrates Commission had actually made its own unco-operative stance clear. Moreover, almost all Chief Magistrates and Heads of Office were conservative white Afrikaner men who were unlikely to encourage attendance of the magistrates falling under their leadership. In the circumstances the TRC would have done better to explore other avenues for engaging the magistracy in the Legal Hearing than just following the route dictated by bureaucratic protocol.

The fact of the matter is that at the time the TRC Legal Hearing had become a highly contested matter within legal and judicial circles. The response of the judiciary to the TRC had been notably antagonistic. In turn this aroused public

outcries aimed at the judiciary and there were calls for subpoenas to be issued on the judges, forcing them to participate in the TRC Hearing. The TRC discussed this at length and eventually decided not to do so (Boraine, 2000:186). The result of all of this was that the tone of the hearings became quite adversarial with the TRC Chairperson, Bishop Tutu, even attacking the judiciary in his opening address (Dyzenhaus, 1998:30). In short, the climate that had been created around the hearings was not conducive to encouraging participation from a reluctant magistracy.

In its findings the TRC stated

The Commission deplores and regrets the almost complete failure of the magistracy to respond to the Commission's invitation, the more so considering the previous lack of formal independence of magistrates and their dismal record as servants of the apartheid state in the past. They and the country lost an opportunity to examine their role in the transition from oppression to democracy (TRC report Vol 4, 1998: 108).

This assessment of the lost opportunity is surely correct. Notwithstanding the various factors contributing to the magistrates' lack of participation in the TRC process, it is indeed disappointing that magistrates did not make better use of the opportunity to engage with their past and to contribute to the process of transformation. The Special Legal Hearings came at a critical moment in the transformation of the magistracy. Instead of using the formalistic 'lack of authority' argument (see above, pages 64-65) to explain their non-attendance, it could have been an instructive and important opportunity for magistrates to have asserted their newfound independence in the eyes of the public. In the words of Gready and Kgalema (2000:14):

It is not possible to embrace transformation, including the idea of independence, without acknowledgment and accountability. This will require institutional leadership and individual reflection. Given this inauspicious beginning, it remains to be seen how the profession will engage with future challenges in the process of transformation.

4.5 Concluding remarks

With the benefit of hindsight, some of the magistrates interviewed acknowledged the lost opportunity presented by their non-attendance at the TRC hearings:

We do need a structure to deal with the kinds of problems the TRC tried to do ...In simple terms: the judiciary has not been unaffected by apartheid and is still carrying baggage from that era and if it is not properly treated we will have some kind of a situation as a result (Interview with Magistrate 'Dlamini').

One would be naïve to say that there is no need for such a commission [as the TRC] (Interview with Magistrate 'Mandla').

Magistrate 'Mapoi' even suggested that the original JOASA submission should be scrutinized as part of a process of dealing with the past

I have decided that with the renewed concerns on racism within the judiciary, the document must reemerge and be submitted to both the Chief Justice and the Minister of Justice and Constitutional Development (Interview with Magistrate 'Mapoi')

It is unclear how the majority of magistrates engaged with, or even acknowledged the contents of this submission at its time of writing. More important than scrutiny by the Chief Justice or Minister, would be magistrates own active engagement with the content of the document. The comments above though, seem to express that the need for 'dealing with the past' is based more on concerns about residual racism rather than concerns about the structural transformation of the magistracy as an institution. As much as attitudinal concerns are an important part of the transformation process, in Chapter 3 we saw that there were still a number of outstanding institutional issues in securing magistrates independence and that these needed to be addressed as well.

CHAPTER FIVE

PROFESSIONALISATION AND INSTITUTIONAL TRANSFORMATION

The approach in this thesis has been broadly historical, following developments affecting the magistracy from the apartheid era to the beginning of new democratic dispensation with special attention paid to the (missed) opportunity offered by the TRC Legal Hearings. However, that history is ongoing and needs to be updated with reference to more recent developments like the strategic policy document, Justice Vision 2000; notable court cases such as *Van Rooyen* (2001) and the introduction of a National Quality Assurance Division by the Magistrates Commission. In part this chapter is concerned with an updating of these recent developments. However, this is not merely a descriptive history of the development of the magistracy. In practice the institutional transformation of the magistracy presents a complex challenge because, even as the institution requires statutory separation from the executive and public service, the magistracy paradoxically requires the Department of Justice's policies to guide this process. But this does not mean that the policies and interventions of the Justice Department provide the criteria against which such transformation is to be assessed (otherwise whatever the Department decrees or does will determine what counts as "transformation"). As a study of the transformation of the magistracy a more holistic understanding of the overall process is required. This is attempted with reference to two broad perspectives: i) the development of international standards for the independence of the judiciary which provide a set of relevant benchmarks and criteria for assessing the ongoing transformation of the judiciary and magistracy in South Africa, and ii) the broad social process of professionalisation as applied to the particular case of the magistracy.

A number of key international documents describes the essential elements of judicial independence. These include the United Nations Basic Principles on the Independence of the Judiciary which were endorsed by the General Assembly in 1985; the Syracuse Draft Principles on Independence of the Judiciary prepared

by the International Commission of Jurists in May 1981; the Universal Charter of the Judge prepared by the International Association of Judges in 1999; and more recently, the Bangalore Principles of Judicial Conduct drawn up by the Judicial Integrity Group in 2001 and endorsed by the United Nations Commission on Human Rights in 2003. The second part of this chapter will begin with a brief review of these international standards for judicial independence, as well as challenges to the magistracy's institutional independence in court cases such as *Van Rooyen* (2001), and discuss the implications for the transformation of the magistracy in South Africa.

The ongoing changes to the magistracy described in previous chapters, particularly their removal from the public service and their improved security of tenure, are also characteristic of the general process of increased professionalisation. Other changes typically associated with professionalisation include: specialized skills and training, a minimum salary, the formation of professional associations and the development of a code of ethics to govern the professional practice (Carr-Saunders, 1966:2). In addition, a concept central to professionalisation is that the professional 'proceeds by his own judgment and authority; he thus enjoys "autonomy" restrained by responsibility' (Moore, 1970:6). This 'autonomy' for the magistracy is expressed as judicial independence. As Moore articulates, autonomy needs to be balanced with responsibility, which implies an associated need for appropriate accountability structures. The transformation of the magistracy may thus be considered in terms of the institutional changes needed to entrench the magistracy's independence and support their continuing professionalisation. The final part of this chapter will focus on these issues. There is a wide range of such issues relevant to the institutional transformation of the magistracy including their relationship with the community and the transformation of mindsets and organizational culture. For the purposes of this research, the final section of this chapter will focus on some key issues relating to independence and

accountability within the framework of increased professionalisation of the magistracy.

5.1 Ongoing developments in the transformation of the magistracy

During the first decade of the new South African democracy after 1994 various policy positions were announced and institutional changes introduced with regard to the magistracy. We will briefly review some of the main developments in this process including measures to consolidate the independence of the magistracy and to revise the functions of the inspectorate division.

5.1.1 Justice Vision 2000: Consolidating the Independence of the Magistracy

Following the initial restructuring of the magistracy, which actually started before the 1994 under the NP government, the Department of Justice (DOJ) identified a number of concerns about the independence of the magistracy. These were outlined in Justice Vision 2000, the strategic policy document for 1997-2000. The concerns listed included the need to 'consolidate the actual independence from the DOJ for lower court judicial officers; and [to] review conditions of work for magistrates to strengthen their independence' (Department of Justice, 1997:38).

The strategy outlined in Justice Vision 2000 included proposals for removing the numerous administrative functions from magistrates.

Subsequently the Department has had some success with relieving magistrates of their administrative duties through a number of strategies. One of these involved the introduction of the "cluster system" which actually dates back to the Magistrates Amendment Act 66 of 1998. Section 2 of that Act allowed for the establishment of a new court management system which included the "cluster system." Magistrates Courts in the nine provinces are structured into fourteen clusters. Each cluster is headed by a chief magistrate who is in control of that

specific cluster, while senior magistrates are in control of a number of magisterial districts on the sub-regional level (Opening address by Dullah Omar, Minister of Justice, 1998).

The cluster system was developed in response to the fact that the removal of Magistrates from the public service meant that the Director-General and the Minister of Justice could no longer give direct instructions to magistrates. The system is based on the idea that control should be exercised over magistrates by magistrates themselves. The cluster system also aims to separate administration and prosecution from the judicial functions of the magistracy (Opening address by Dullah Omar, Minister of Justice, 1998).

More recently, this model has included the reallocation of all non-judicial administrative functions traditionally exercised by chief and senior magistrates to court managers. It intends to do away with the need for the current regional offices-based model, devolving administrative decision making to the court level in order to reduce response times and improve the efficiency of the court system. In principle this would allow the leadership in the courts to focus on legal questions and judicial functions and also to provide professional guidance to new entrants to the judiciary (Department of Justice, 2004 *re aga boswa* brochure).

5.1.2 Review of inspectoral scrutiny

In Chapter Three we discussed some of the problems relating to the traditional role of the Inspectorate Division. The inspectorate division's role of enforcing the compliance of magistrates with department policy became increasingly problematic in an environment in which magistrates were supposed to be independent from the Department of Justice. The Department itself raised this problem in Justice Vision 2000, and accepted that the inspectorate's role and function needed to be reconsidered to ensure independence of the magistracy (Justice Vision 2000: 38).

The changes to the inspectorate division came about over the same period as the cluster system was developed. Although the inspectorate is now generally called the 'Quality Assurance Division', the name change has not been legislated, but came about 'a long time ago after discussions with the Minister in about 1994'. The change was 'minuted at meetings around 1997 and approved by the Magistrates' Commission and the Minister.'¹¹ (Telephonic interview with Mr. Chris Barnard, Head of the Quality Assurance Division 14/9/2005). At this stage the renamed inspectorate, now as the 'Quality Assurance Division', was still located within the DOJ. The Minister at that time indicated that the change in function should be implemented with immediate effect i.e. that the Quality Assurance Division should no longer do administrative inspections on behalf of the DOJ, but only judicial inspections. Due to a lack of resources and skills, the Department requested that the judicial officers (quality assurors) continue to assist the Department until the Department had built sufficient internal administrative capacity. Thus in practice a designated set of quality assurance magistrates were to continue with both administrative and judicial inspections (memorandum from Secretary of the Magistrates Commission 3/11/2005).

In 2003, the Magistrates Commission requested that the Department allow for management and control of quality assurance magistrates to be taken over by Judicial Heads in the various administrative regions. But there was still insufficient capacity within the Department to perform administrative quality assessments and the Minister decided that Quality Assurance magistrates would continue to report to the Department in relation to their administrative work and report to their respective Cluster Heads for their judicial work (memorandum from Secretary of the Magistrates Commission 3/11/2005). Only in April 2004 was the National Division of the Quality Assurance Division relocated to the Magistrates Commission and at the same time, the Department took over the

¹¹ It is interesting to note that when phoning the Department of Justice in order to locate the phone number of the 'quality assurance division' all personnel that the researcher spoke to (from the central switchboard through to general departmental personnel) still referred to it as the Inspectorate, some 8 years after the approval of the name change.

administrative quality assurance function (memorandum from Secretary of the Magistrates Commission 3/11/2005). It is clear then that until very recently, incumbents to these posts, who are in fact magistrates, continued to perform work for the Department of Justice. Their functions include a minimum of 500 court hours (in order to keep up to date with judicial work), caseload and court management, training, disciplinary investigations and trials; and should not include work for the Department of Justice, as is the case with any other magistrate. Their continued close working relationship with the Department for some ten years after the implementation of the Magistrates Act 1993 is problematic, with serious implications for perceptions of their independence affecting confidence from within the magistracy.

It is therefore not surprising that more than half of the magistrates interviewed indicated various levels of distrust in the incumbents and suspicions of the intentions of the 'quality assurance' division, especially with regard to the process around the establishment of the National Division and the selection of the incumbents to their posts. A number of magistrates mentioned these appointments as an impediment to transformation of the magistracy as the incumbents appear to have been appointed without much transparency. Many voiced concerns that it was 'a job creation exercise for the people from the old inspectorate' (Magistrate 'Brown' 10/11/2005). As 'Brown' articulates further:

I am concerned that the Magistrates Commission seems to be allowing itself to be controlled by persons who were formerly very much a part of the executive of the previous government. These people will serve any master to achieve their own ends. They strike fear into the hearts of some magistrates because of their past behaviour. They know little about independence and I fear have even less respect for it.

The researcher requested clarity on the appointment process from the Quality Assurance Division and the response stated:

The erstwhile Inspectorate Division consisted of judicial as well as administrative posts. With the separation of the judicial and administrative functions a number of legally qualified officials were retained at National level in Judicial Quality Assurance posts while in each of the thirteen Judicial Administrative Regions posts of Regional Judicial Quality Assurance officers were created. At the time of separation of functions the Inspectorate functioned in a number of Judicial Administrative Regions. The Judicial Quality Assurance magistrates serving at National level and Regional Divisions were retained while in three instances, Free State-Welkom, Mpumalanga-Nelspruit and KwaZulu/Natal-Pietermaritzburg the posts were advertised and filled in the normal course of events

(email from Jan Saaiman, National Quality Assurance Division 5/12/2006).

Magistrates' concerns about the establishment of the Quality Assurance Division being a 'job creation exercise for the old Inspectorate' seem justified as, except for the three new posts that were created, all the posts are filled by ex-Inspectors.

An actual clear divide between the respective roles of the Department and of the Magistrates Commission in 'inspectoral scrutiny' still does not seem well-established despite the separation of these functions in 2004. A memorandum emailed to the researcher from the Secretary of the Commission on 3/11/2005, states

The Commission and Cluster Heads agree that the judicial quality assurance officers could still assist the Department if requested and when it is viable. The Judicial Quality Assurance Component is committed to assist the Department wherever circumstances so require.

This comment is disturbing in its implications for independence. Quality assurers are magistrates and as part of their function are required to perform magisterial duties in court. They should not be performing duties for the Department of Justice as well.

The issues raised by magistrates interviewed about the Quality Assurance Division also relate to the concept of internal or individual independence. This requires magistrates to be free from the influence of colleagues including that of both their horizontal and vertical “bosses” (Dung, 2003:11). This does not preclude magistrates from sharing the facts of cases and discussing relevant legal issues with colleagues, but does require the process to be a consultation rather than an authoritarian instruction (Dung, 2003:12). The historical functioning of the Inspectorate was one of authoritarian state controlled instruction, and from the personal accounts in Chapter 3, it seems that the incumbents were dedicated implementers of such authority. It is not surprising, then, that magistrates still articulated a strong sense of distrust in the Inspectorate under its new guise of the Quality Assurance Division.

Perhaps the Magistrates Commission could have communicated the revised role and function of the Quality Assurance Division in a manner which reflected a better understanding of the problems with the historical role of the former Inspectorate as well as presenting a strategy to combat the perceptions of distrust at the time of the changes. The comments from the magistrates interviewed seem to indicate an overall lack of confidence in the Magistrates Commission resulting in a lack of trust in its initiatives. The Magistrates Commission should be questioning the effects on independence of the relationship of the Quality Assurance Division with the Department, not encouraging a continued working relationship as suggested in the memorandum.

On the other hand, there also needs to be a greater acknowledgment of their own roles in the past by the magistrates interviewed themselves. Although the concerns raised in the interviews may be valid in terms of their distrust of particular individuals in the posts as well as the reasons for the creation of the Quality Assurance Division, their concerns fail to acknowledge that they too, for the most part, have remained in their posts, just like the individuals in the

Inspectorate whom they distrust. Many South Africans distrusted and feared the magistrates in the old dispensation yet magistrates seem to absolve themselves from their own culpability in 'the past' or of any need for them, too, to be held accountable in that regard.

In short, although there is nothing intrinsically wrong with the establishment of an internal accountability mechanism within the magistracy, there is a problem when this mechanism, through the nature and history of incumbents selected for the posts, is regarded with suspicion and distrust by the very people who are meant to account to such a structure. In addition, there was no dialogue and collective understanding or belief as to how the roles of those incumbents will be changed. It would have served the magistracy well to have discussed this particular issue at the TRC had they attended.

5.2 International standards of judicial independence

We have noted that in recent years a number of international declarations have articulated the essential elements of judicial independence, and that these may serve to provide a set of relevant benchmarks and criteria for assessing the ongoing transformation of the judiciary and magistracy in SA. The key elements of judicial independence highlighted in these international declarations include the following:

- An essential element of judicial independence is that of *external independence* which implies that the judiciary must be free from any external influence and control (including that by the executive and legislative branches of government) and free to determine matters impartially, on the basis of fact and in accordance with law (United Nations Basic Principles on the Independence of the Judiciary, 1985).

- Another aspect of judicial independence is that of *internal independence* which requires independence from judicial colleagues including chief magistrates and the Chief Justice (Section 1(4) of the Bangalore Principles of Judicial Conduct 2001).
- Equally important for the effective functioning of judicial independence is the need for *security of tenure and remuneration, protection from arbitrary transfer* and that judicial officers should enjoy *personal immunity from civil suits* for monetary damages for improper acts or omissions in the exercise of their judicial functions. (United Nations Basic Principles on the Independence of the Judiciary, 1985).

We will return to a closer consideration of the relevance and implications of these different elements of judicial independence for the South African magistracy below. But first we must consider a more general challenge to the institutional independence arising from a key court case.

5.2.1 Challenges to institutional independence

The constitutional requirement that the courts are institutionally independent and impartial was challenged specifically in relation to the magistrates courts in 2001 in *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC). This case provides an illuminating perspective on the complex process of consolidating the magistracy's independence from the Department of Justice.

In 2001, a full bench of the Transvaal Provincial Division of the High Court found that the regional court did not function as an institutionally independent and impartial court of law, due to the degree in which magistrates were regulated by the Department of Justice, by the office of the Attorney-General and still functioned as part of the civil service generally (*Van Rooyen*, 2002: 811). The High Court found that the regional court was not a competent court in terms of

section 165 of the Constitution because it lacked the independence required (*Van Rooyen*, 2002:811). On these grounds the Court found a number of sections of the Magistrates Court Act and Magistrates Act unconstitutional and invalid. The case was then referred to the Constitutional Court and required them to consider the question of the institutional independence and constitutional legitimacy of the lower courts in the light of the statutory provisions applicable to magistrates (*Van Rooyen*, 2002:811). Although the Constitutional Court found the magistracy to be sufficiently independent, subsequent analyses of the judgment, gave rise to further debates which suggest that the issue has not been resolved.

Thus Franco and Powell (2004:576) conclude that whilst the magistracy may be statutorily independent, it still lacks institutional independence. They argue, firstly, that there is an overlap between the branches of government in that magistrates still carry out administrative functions. This has implications for independence as it creates a closer relationship with the executive than that of the higher courts. Secondly, in support of the original High Court decision, they argue that the Magistrates Commission cannot fulfill its function of guarding the independence of the magistracy unless it itself has the power and authority to make and carry out independent decisions (Franco and Powell, 2004:568). In its judgment, the High Court had concluded that the Magistrates Commission is an executive structure and that 'to all intents and purposes the Magistrates Commission is an organ of State' and therefore lacked institutional independence (*Van Rooyen*, 2002:823, at para 36E-F) This argument is based on the increased say of the legislature and executive in the composition of the Magistrates Commission since the 1996 changes to the Commission. Although the Constitutional Court found this not to be problematic, combined with the wide discretionary powers of the Minister these factors do seem to limit the Commission's ability to make independent decisions.

On closer consideration the decisive factor affecting the independence of the magistracy is that of the Minister of Justice's wide discretionary powers, more particularly in relation to the Magistrates Commission. As mentioned in Chapter 3, the Minister has sole discretion in approval of early retirement, and the creation of a complaints procedure by the public. In matters concerning appointment, extension of tenure, promotion, general conditions of service and assigning of administrative powers, the Minister acts 'after consultation with' or 'on recommendation of' the Magistrates Commission, but retains the power not to follow the advice of the Magistrates Commission (Franco and Powell, 2004: 578).

And it seems that in practice this power is indeed used at times to override the advice of the Commission. The Commission notes this as a concern in its 2001 report on the rationalization process of the courts:

The empowering provisions of the Magistrates Act, 1993 only allow the Commission to make recommendation, to advise or to report in regard to certain specified matters. It does not have the power to give direction to anyone. A number of previous recommendations by the Commission have not been implemented whilst others appear to have been simply ignored (Magistrates Commission, 2001:10).

From this it appears that the concerns of Franco and Powell, as well as those of the High Court, regarding the lack of judicial independence of the magistracy are by no means theoretical only.

In its 2001 report the Magistrates Commission also raised other concerns about the relationship between the Department and the magistracy. Inter alia it stated that 'it is difficult to conceive how the courts could be perceived as being independent of the executive when they appear in the hierarchical structure of the Department of Justice's organogram' (Magistrates Commission, 2001:4). The report recommended that the entire judiciary (judges and magistrates) should be structured as 'a separate institution with its own manifest identity'. (Magistrates Commission, 2001: 4). It suggested as well that the Magistrates

Commission should operate independently from the Department, that timeframes for ministerial contemplation of recommendations from the Commission should be stipulated by law, and that grounds for any rejection of recommendations should be set out, i.e. that the Minister should be required to provide written reasons for rejecting any recommendations (Magistrates Commission, 2001: 14).

Although the courts have subsequently been removed from the Department's organogram, none of the other major issues raised in the Magistrates Commission's report or by Franco and Powell have so far been addressed. In an email from the Secretary of the Commission, in which he responds to the researcher on a query about the status of these issues, he states that 'there have been no further developments regarding any of the matters raised in your message. We assume that all these matters will be considered when the Department begins with the consultation process which we assume will start next year' (email from the Secretary of the Magistrates Commission 4/12/2006).

5.2.2 Distinct elements of judicial independence

We now consider the distinct elements identified above at the beginning of this sub-section 5.2 with reference to the international declarations of standards for judicial independence.

5.2.2.1 Protection from arbitrary transfer

The matter of transfer of magistrates is dealt with in regulation 22 of the Regulations for Judicial Officer in the Lower Courts, 1993, which states:

22. (1) A magistrate may -
- (a) upon due application;
 - (b) with his or her consent; or
 - (c) without his or her consent, but for good reasons and without favour or prejudice, if necessary in the interest of the administration

of justice, be transferred upon the recommendation and direction of the Commission.

(2) The Director-General shall, upon direction of the Commission, effect the transfer of a magistrate.

Magistrates can therefore still be transferred without their consent. However, the power to recommend magistrates' transfers was removed from the Inspectorate Division. Instead, now such recommendation will normally be made by the Regional Court President or Chief Magistrate [Cluster Head] concerned, for consideration by the Magistrates Commission (email from the secretary of the Magistrates Commission 20/10/2005). Significantly, the Magistrates Commission's role is merely advisory and the final decision still rests with a political appointee, the Director-General.

5.2.2.2 Security of tenure and remuneration

Section 13(1) of the Magistrates Act, 1993 states that magistrates' tenure is secured until the age of 65. But despite the removal of the magistracy from the public service in 1993 their salaries were, until recently, still linked to those of public servants. In its report on the rationalization process of the courts compiled in 2001, the Magistrates Commission recommended that the courts should be given full financial and administrative independence in order that their budget should not be linked to the budget of a government ministry or department (Magistrates Commission, 2001: 4).

The report raised more general concerns that magistrates' salaries were linked to those of public servants albeit through a 'historical accident' (Magistrates Commission, 2001: 9). Although remuneration was determined by the Minister after consultation with the Commission, the actual state of affairs was that the Department of Justice formulated its personnel expenditure budget after a process of bargaining with trade unions and employer representatives. The

funding of salaries for magistrates was thus provided together with the budget for entire public service section of the Department. The implication of this was that the Minister's determination of magistrates' salaries was in fact entirely dependent on increases agreed on in the bargaining process for public servants. Neither magistrates nor the Commission were represented at this bargaining process (Magistrates Commission, 2001: 9). In addition, acting magistrates (who are usually retired magistrates brought back in to service on a temporary basis), entered into service agreements with the DOJ for payment of salaries and other service conditions and were regarded as employees of the Department (Tladi and Myburgh, 2004:2).

Changes to these processes were effected by the implementation of the Judicial Officers (Conditions of Service) Amendment Act 28 of 2003. The funding for magistrates' salaries is no longer dealt with as part of the entire public service or as part of the budget of the DOJ and the definition of magistrate was amended to include acting or temporary magistrate. Instead of the Minister of Justice, the President now determines the salary scales after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-bearers (Section 12 (1)(a)(i) of the Magistrates Act 90 of 1993). The Act also amended the Independent Commission for the Remuneration of Public Office-bearers Act, 1997, so as to extend the definition of "office-bearer" to include judges and magistrates (preamble to the Judicial Officers (Conditions of Service) Amendment Act 28 of 2003).

5.2.2.3 Personal immunity from civil suits

Another recommendation raised in the Magistrates Commission's report of 2001, was that of judicial immunity and privilege and that magistrates' indemnification and immunity should be stated in legislation, and should be the same as that of judges (Magistrates Commission, 2001:14). Despite these proposals, magistrates are still not indemnified from civil suits in terms of any legislation.

5.2.2.4 Magistrates' own perceptions of judicial independence

Perhaps one of the most interesting (although unintended) insights revealed through the interview process with magistrates was their response to the question 'what are the key elements of transformation of the magistracy in your opinion?' The assumption was that independence would be named by all interviewees when in fact *not one person* identified it as a major benchmark of the transformation process. When further probed, the responses fell broadly into two categories; one group felt that they had always been independent and free from interference by the executive, and the other responded that the level of independence from the Department of Justice at this stage is merely 'window-dressing'. Both categories of responses present an insight into magistrates' engagement with their independence and by implication with their past. In different ways both these responses seem to confirm that magistrates have indeed not grappled significantly with their relationship with the state in the past and nor do they have a collective sense of what their independence is (or should be).

Magistrates' conceptions of independence were further revealed when the interviewees were confronted with the question: 'who would you say is your employer?' Only one magistrate ('Brown') responded without hesitation that she saw herself 'as being a part of the judicial branch of government' and that she 'follow[s] section 165(2) of the Constitution'. Others were less certain about their responses to this question. The following four comments seem to sum up the general feeling of the other respondents:

'I don't know who my employer is. There are no structures in place to make 1993 do-able...Strictly speaking we are still public servants' (Magistrate 'Dlamini').

'We are out there on a raft' (Magistrate 'Smith').

‘The Minister of Justice...No...the Magistrates Commission...I don’t know who I am working for...the Minister appoints me, the Commission deals with me...the Department pays me...’ (Magistrate ‘de Kock’).

‘They [the Department of Justice] just don’t want to relinquish their power over us’ (Magistrate ‘Lombard’).

These statements confirm that there is still a lack of certainty regarding the relationship between the Department of Justice and the magistracy. The amendments to their conditions of service in 2003 which entrenched their status as public office-bearers should have provided a clearer sense that magistrates should no longer consider themselves as employees. The comments also reflect the validity of some of the concerns raised by Franco and Powell and the Magistrates Commission in their discussions of the continuing lack of judicial independence of the magistracy.

5.3 Professionalisation and transformation of the magistracy

We have suggested that the ongoing changes to the magistracy, particularly their removal from the public service and their improved security of tenure, may also be considered in terms of the general process of increased professionalisation. Crucial to that process, and closely associated to the principle of judicial independence, are the development of notions and practices of professional autonomy and self-government. Typically these are associated with requirements for specialised training and qualifications, the formation of professional associations and the development of a code of ethics to govern the professional practice (Carr-Saunders, 1966:2). We will briefly consider the transformation of the magistracy within this general perspective of professionalisation.

5.3.1 Professional Qualifications, Education and Training

An essential element of professionalisation is the acquisition of specialist skills and formal knowledge which are usually recognized through credentials awarded by a university (Carr-Saunders, 1966:2). In the case of the South African magistracy this is a relatively recent development. Historically magistrates had entered the civil service with few specialist skills or formal qualifications and worked their way through the system on the basis of state-sponsored courses at Justice College as well as by acquiring experiential knowledge. Formal legal qualifications or university degrees were not a requirement for becoming a magistrate, and appointment as a magistrate was generally through internal promotion (from the ranks of clerks or prosecutors) rather than external recruitment (Kgalema and Gready, 2000:3). The situation changed somewhat with the creation of the regional courts in the 1950s whose presiding officers were required to have an LLB or Public Service Senior Law Certificate (Section 9(b) of the Magistrates Courts Act 32 of 1944), but until very recently district court magistrates (the majority of magistrates) were not required to be legally qualified.

With the ongoing professionalisation of the magistracy that position has changed significantly. The current minimum qualification required by all magistrates is a law degree, e.g. a Dip Iuris, B Iuris, Dip Legum or LLB (email from the Secretary of the Magistrates Commission 31/1/2007). This is not yet stated in the Magistrates Court Act or in the Regulations, but is current practice within the Magistrates Commission. Furthermore, regional court magistrates are now required to have seven years of appropriate experience as well as the necessary degree (email from the Secretary of the Magistrates Commission 31/1/2007).

In other ways, too, professional qualifications for the magistracy have been formalized. The Regulations for Judicial Officers requires magistrates to be 'fit and proper persons' (Section 3 (1) (b)); to have attended an applicable course at

Justice College and to have sat for 6 months as a temporary or candidate magistrate (Sections 3(1) f (i) and (ii) of the Regulations for Judicial Officers).

Continuing education is another essential element of professionalisation, as the magistrates need to keep current with developments in the field (Carr-Saunders, 1966: 14). This is sustained through courses offered by Justice College, the official training institution of the Department of Justice, as well as ARMSA and JOASA. The magistrates who were interviewed also reported that many magistrates make use of emails to colleagues or the associations' websites to post queries about case law or other legal matters.

The shift to a requirement for formal legal qualifications implies that the status of magistrates has been enhanced as has their capacity to deal with complex legal matters. It has also opened up recruitment to advocates and attorneys encouraging a change in the profile of magistrates.

These important changes to the status and quality of magistrates still need to be acknowledged though amendments to the Magistrates Court Act 1944 and to the Regulations. According to the Secretary for the Commission, there is no immediate plan to amend the Regulations as there are a number of other issues to be addressed that will take time to finalize and the Commission does not want to amend these in a 'piecemeal manner' (email from Secretary of the Magistrates Commission 31/1/2007). In the same email, the Secretary states that the Commission requested 'some time ago' that the Department amend the applicable section to refer merely to a 'fit and proper person' as in the case with judges but no decision has been taken yet.

5.3.2 The development of a professional code of ethics

The development of a professional code of ethics within any profession emphasises an understanding of the need both for internal self-regulation as well

as for legitimacy in the eyes of those outside the profession (Moore, 1970: 115) Professional Codes of Ethics regulate conduct and protect both the magistracy as an institution as well as those who use the courts. (Carr-Saunders, 1966: 14). The South African judiciary, together with a number of judiciaries worldwide, has recently focused its attention on issues of regulating judicial conduct. Three international codes which South Africa has adopted, have recently been developed and support the South African judiciary's own internal codes.

The three international codes are:

- The Latimer House Principles and Guidelines (1998)
- The Limassol Conclusions (2002)
- The Bangalore Principles of Judicial Conduct (2003)

The two national ethical guidelines are the Code of Conduct for Magistrates (1994) and Judicial Ethics in South Africa (Guidelines for Judges). The latter document has not yet been promulgated, but was created out of a need for a more detailed guideline than the Code of Conduct (Franco and Miller, 2004: 3).

The Magistrates' Code of Conduct binds all magistrates in South Africa and covers the same general principles as laid out in the international guidelines above. Magistrates are also bound by the Magistrates Oath is set out in Section 9 (2) (a) of the Magistrates' Courts Act No. 32 of 1944:

"I,..... (full name).....
do hereby swear/solemnly affirm that in my capacity as a judicial officer I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."

The codes of conduct and affiliation to international norms of standards of behaviour indicate a distinct shift towards an acceptance of the need for judicial accountability, increasing the magistracy's legitimacy as an institution.

5.3.3 Formation of Professional Associations

The formation of professional associations acts as an authenticating agency for the collective – in this case the magistracy. Affiliation to these bodies allows for professional conduct to be brought under peer review and assists with protecting the reputation of the collective group (Moore, 1970:116). In addition, professional associations sustain the professional culture (Carr-Saunders, 1966: 9).

Magistrates have two professional organisations that represent them – the Judicial Officers Association of South Africa (JOASA) and the Association of Regional Magistrates of South Africa (ARMSA). Both organisations are recognised by Section 41 of the Regulations for Judicial Officers of 1994.

JOASA is a voluntary association that was set up in 1996 and held its first annual general conference in February 1997. It represents some 1200 judicial officers, mainly magistrates in the district courts but also some in the regional courts. ARMSA was established in 1995 and represents about ninety-five percent of all regional courts magistrates.

The improved status of the South African magistracy internationally can be seen in its acceptance in international associations such as the Commonwealth Magistrates and Judges Association and the International Association of Judges. The International Association of Women Judges has also recently opened a South African Chapter.

5.3.4 Selection and appointment

Magistrates are selected through an interview process with members of the Magistrates Commission. These interviews are held in private. The Commission has not yet entertained any request from the public or media to attend interviews

and there is thus no precedent in this regard. The Secretary of the Commission did not foresee that there would be any objection should such a request be received (email from the Secretary of the Magistrates Commission 22/1/2007). Transparency in the process is therefore implied, although that has not at this stage been acted on.

5.4 Accountability

A core characteristic of a democracy is that justice must be seen to be delivered in a manner that is not only fair and according to law, but that is also responsive and accountable to the society it serves (Russell, 1996:1). However, in the case of a magistracy with judicial independence that cannot be ensured through electoral processes. The challenge for any judiciary lies in balancing accountability with independence.

Judicial officers wield enormous power and make decisions that affect important aspects of people's lives such as their freedom, poverty, housing etc. Because of their public prominence, power and influence, their performance should be subject to appropriate accountability mechanisms (Cameron, 1990: 252-253). Elements of accountability, like those of independence, should be both internal and external. Internal mechanisms for accountability include both the review and appeal process within the courts system, the adherence to codes of ethics for judicial officers, the rules of professional associations, and the oversight structures for discipline implemented by the Magistrates Commission. External mechanisms include the need for transparency in the selection and appointment process (Dung, 2003:28). They also include the right of the public to observe court proceedings and to have access to court records, the freedom of the press to criticise the judiciary and the appointment of lay assessors to the courts.¹² The public also have the right to lay complaints against magistrates.

¹² For a detailed discussion on the lay assessor system see Jeremy Seekings with Christina Murray 1998: Lay Assessors in South Africa's Magistrates' Courts. Occasional Paper for the Law, Race and Gender Research Unit. This paper researches the role of the lay assessors in the lower courts and includes the

5.4.1 Complaints and disciplinary structures

Complaints against magistrates are referred to the Magistrates Commission's Ethics Committee. The process for investigation is spelt out in the Regulations and includes an investigation process followed by a public hearing if so required.

Writing on accountability and the South African judiciary, Peter Russell (1996:12) suggests that there is a need for well-publicized notices with respect to how complaints have been dealt with; the information needs to be easily available to all court users and the Magistrates Commission should be required to report annually. He emphasizes that this is not in order to name names, but rather to give the public an idea of the volume, type of complaint and manner in which it has been dealt with. This suggestion might well be good for instilling greater public confidence in the magistracy as well as being in the interests of transparency and accountability. It could also act as a means to ensure timeous finalization of complaints.

5.5 Concluding remarks

The status of magistrates as professional judicial officers has improved considerably since the Magistrates Act of 1993 removed them from the civil service but significant challenges remain in entrenching their status as independent judicial officers.

In general the consolidation of the magistracy's independence from the Department of Justice remains incomplete and a number of key concerns regarding their location in relation to the executive still need to be dealt with. The

views of magistrates as well as the experiences of lay assessors. It compares the attitudes and perceptions of assessors, magistrates and members of the public to such things as the courts, police, rights and crime.

Minister still retains far too much power with respect to critical decisions affecting magistrates and his/her discretionary powers should be reconsidered.

Most of the challenges and concerns around independence and security of tenure could easily be addressed by the Commission's own suggestion in 2001 that the entire judiciary (magistrates and judges) be constituted as 'a separate institution with its own manifest identity'. (Magistrates Commission, 2001: 4). The Department of Justice seems reluctant to recognize the improved status of magistrates as professional judicial officers. This has implications for the magistracy's own morale and perceptions of their status and may affect general public confidence. The continued separation between the status of judicial officers in the higher and lower courts is artificial and no longer relevant in an environment where magistrates are no longer public servants.

The role of the Quality Assurance Division should be reconsidered. It should either be acknowledged that its creation was to ensure that former Inspectors were not purged from their posts, and that the Division therefore has a limited lifespan as an institution; or if it is to continue as an institution, an open discussion should be held with all district court magistrates as to their concerns and suggestions. The role of the Inspectorate in the past has yet to be discussed or publicly acknowledged. Creating a forum for dialogue would allow for perceptions of distrust and other concerns to be addressed. This would also assist in enhancing the status of the Magistrates Commission in the eyes of the magistrates themselves.

The will of the current leadership of the magistracy to drive the process of addressing outstanding issues is unclear – both with regard to the present incumbents and through the uneven weighting of the Commission with political appointees. In the Commission's 2001 report, it was acknowledged that "there is a perception amongst some magistrates that the Magistrates Commission is ineffectual" (Magistrates Commission, 2001:10). The report then goes on to say

that "...even if this perception is warranted, the ineffectiveness is not attributable to the members of the Commission in their personal capacities" (Magistrates Commission, 2001:10). It may be the case that the provisions of the Magistrates Act of 1993 limit the power of the Commission and that final decision making powers still rest with the Minister, but the Commission could develop more effective strategies to ensure that their recommendations receive the necessary attention or response from the Minister. There are eight political appointees on the Commission who could certainly lobby for swifter responses from the Minister. One of the political appointees is in fact the Head of the Justice Portfolio Committee in Parliament. Amongst other responsibilities, this Committee is responsible for monitoring and holding government departments accountable and has the authority to summons anyone to appear before them. They could use these powers to make the process of the Minister's delay or rejection of recommendations more transparent.

There is also no legislative or other impediment to the Magistrates Commission determining and implementing its own policies and strategies for institutional transformation; yet since its 2001 report on the rationalisation of the courts no further progress, nor follow-up reports have been produced. If, as stated in the Commission's submission to the TRC, the role of the Commission is to be 'a watchdog jealously guarding the independence of the magistracy.' (Magistrates Commission submission to the TRC: 4), then the Commission should be far more proactive in ensuring that all aspects of independence are indeed attained.

The Secretary of the Magistrates Commission's response on page 85 that they are waiting for the 'consultation process' that 'we assume' will start in 2007 indicates the Magistrates Commission has not taken responsibility for devising its own strategies and processes, waiting instead for leadership from the Department and/or Minister of Justice. This might also be a consequence of the strong links that the Commission has to the ruling party mentioned in Chapter 3.

In its judgement in the Van Rooyen matter, the High Court seems to support this view:

‘Insofar as the Magistrates Commission has any role to play in taking decisions, making its views known to the Minister or making recommendations...it is unlikely to take any decisions, express any views or make recommendations which do not find favour with the Minister’ (Van Rooyen, 2002:823, at para 36G).

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CHAPTER 6

CONCLUDING REMARKS AND RECOMMENDATIONS FOR FURTHER RESEARCH

6.1 Transforming the Magistracy: How Far Have We Come?

In the last fourteen years the political landscape has changed dramatically in South Africa. Since the first democratic elections in 1994, government authority is now exercised legitimately and government is committed to adherence to the rule of law rather than rule by law. The Constitution of 1996 affirmed the concept of separation of powers and entrenches the independence of the judiciary – both that of judges and of magistrates. As we have seen in the preceding chapters, a number of key legislative and institutional changes, such as the removal of magistrates from the public service, the establishment of the Magistrates Commission, and the implementation of the cluster system also took place in order to ensure magistrates were no longer a part of the civil service subject to the executive and further securing their independence.

But in order to answer the question 'how far have we come' in transforming the magistracy we need to look at the internationally recognised standards of judicial independence as benchmarks by which to evaluate the progress to date. We will briefly consider the core elements identified in Chapter 5 in order to answer the question.

6.1.1 External independence

This principle requires that judicial officers must be independent, impartial and free from external political or other interference. In terms of their institutional location and in exercising their judicial decision-making role, magistrates have been provided with sufficient security for them to act independently. Provisions for their independence include the establishment of the Magistrates Commission,

the separation of administrative and judicial functions, the autonomous power of cluster heads and chief magistrates under the cluster system. But in practice external independence has not yet been effectively ensured. External independence requires a complete lack of interference from the executive, and in particular from the Department of Justice. However, the current institutional arrangements indicate a heavy reliance on decisions by the Minister for a number of critical issues relating to the conditions of service for the magistracy. Although, unlike the High Court, the Constitutional Court decision in *Van Rooyen* found the magistracy's institutional independence to be adequate, practice indicates that the Minister can, and does, ignore the Magistrates Commission's recommendations. The Magistrates Commission also relies on the Minister and Department of Justice to lead them in most matters concerning magistrates. It may well be time to reconsider the composition of the Commission in order to decrease the direct and indirect control of the executive and governing party on their activities. Both the Hoexter and Law Commissions recommended structures that were far more independent, with minimal involvement of the Department. A Commission which is largely representative of the judiciary, the legal profession and civil society would be less controversial and may better serve the interests of the magistracy.

6.1.2 Internal independence

Internal independence requires magistrates to be independent from their colleagues and vertical and horizontal bosses and that in terms of their judicial decision-making; they should never receive direct authoritarian instruction. Magistrates appear to have had some success with entrenching internal independence specifically through their removal from the civil service. The cluster system has allowed magistrates to manage themselves through the designation of decision-making authority to cluster heads and chief magistrates. This internal restructuring has also delegated administrative duties to court managers. Magistrates no longer receive direct instruction from the Department of Justice

and are no longer reliant on merit awards from the Department for promotion or salary increases. In the preceding chapter we discussed the concerns about the Quality Assurance Division. Although structurally it is an acceptable monitoring mechanism, its composition and history raise concerns about potential influence on internal independence. It may be that these concerns are based only on perceptions and have nothing to do with actual practice, but they do need to be addressed.

6.1.3 Security of tenure and remuneration, protection from arbitrary transfer and personal immunity from civil suits

The fundamental protections of security of tenure and remuneration have been secured and with that, the professional status of magistrates enhanced. The fact that two internationally recognized core elements of independence, namely protection from arbitrary transfer and personal immunity from civil suits, have not yet been sufficiently addressed is a matter of concern. It remains for magistrates themselves to confront their lack of protection from arbitrary transfer and immunity, both of which could easily be effected through a challenge in the courts should an unwanted transfer be demanded or a civil suit implemented against a magistrate.

6.2 Recommendations for Further Research

As we have discovered, there is a serious absence of research into the magistracy in South Africa and as a result there are numerous research projects that could be undertaken focussing on a variety of topics and concerns. Research reports could assist further transformation of the magistracy by acting as a catalyst for further developments and change. As a result of this research project, two key topics for further research have been identified.

6.2.1. Dealing with the past

The chapter on the TRC Special legal hearings as well as the interview material indicated a general reluctance of magistrates to recognise and acknowledge their role under the apartheid government. Interview material indicated engagement with the past was generally selective and self-serving interspersed with a few honest acknowledgements of the situation as it was. The benefit of time and hindsight might well allow for an honest and valuable assessment of their role in an in-depth and comprehensive investigation into the past. Addressing the past is fundamentally interlinked with addressing the challenges of the present and the future. It might also serve the magistracy well to convene a process of institutional introspection and review. The TRC moment has passed, but a similar process which engages with looking at the past as well as assessing the advances that have been made could assist the magistracy in addressing current concerns about racism, the Quality Assurance Division, the leadership and role of the Magistrates Commission as well as clarify magistrates' own sense of independence, accountability and professionalism.

6.2.2 Comparative study

A number of the issues and concerns affecting the South African magistracy relate to the fact that the system has its roots in a colonial past, and are not only the result of apartheid government policy – for example the fact that they were civil servants and not required to be legally qualified is a common characteristic of magistrates in all former British colonies (Mack and Roach Anleu, 2006: 374; Russell, 2007:9).

Several other former British colonies - such as Australia, Canada and India - have also been faced with transforming a former colonial judicial system into one that is more desirable in terms of international norms; the main difference being that these countries all began their reforms in the mid-1960s. A preliminary and

brief investigation into the situation in Australia and Canada revealed that the dearth of literature and research into the magistracy is not unique to the South African situation. Australia has slightly more readily available recent research literature since the establishment of the Magistrates Research Project at Flinders University in 2000. Research reports from this Project indicate that there are a number of similarities to South Africa in how transformation has been implemented in Australia. The magistrates' courts were retained as lower courts in both name and function and although magistrates' professional statuses have improved considerably a number of concerns remain with regard to their independence (See for example Mack, K & Roach Anleu, S. 2006. *The Security of Tenure of Australian Magistrates*).

The Canadian reforms were somewhat different in that the institutional restructuring introduced in the mid-60s did away with the magistrates' courts which were replaced by a provincial court system (Russell, 2007:10). Courts are now staffed by a legally trained judiciary whose qualifications almost match those of the federal (superior court) judges. Their conditions of service and status approach those of federal judges, so much so that the current debate in Canada is whether the distinction between lower courts and superior courts should be abolished entirely (email to the researcher from Peter Russell 8/1/2007).

It seems that different approaches have been taken with respect to the transformation of the magistracy in former British colonies. It may not be feasible to engage in any comprehensive comparative survey, but it is possible to look at the main approaches with a view to identify similarities and differences. It might be useful to compare the relative successes and lessons learned from each experience.

6.3 Concluding remarks

Whilst the constitutional and institutional principles for independence may have been put into place, the persistence of past practice and attitudes in many ways suggests that transformation of the magistracy still has some way to go. Despite their increased professionalism, magistrates still do not command the same respect as judges and the Department seems unwilling to address outstanding concerns regarding independence with any haste. Contrary to the assertions of the Magistrates Commission that they 'guard the independence of the magistracy', they have not been particularly proactive in ensuring that all the requirements of independence are met. At the same time, magistrates themselves appear to be struggling with asserting their independence and seem content to wait for direction from the Commission or the Department. Magistrates should challenge the leadership offered by the Magistrates Commission in addressing their concerns and insist on a far more robust and active approach to matters of continuing transformation.

But despite these shortcomings, independence and transformation of the magistracy should be seen as an evolving process. Transformation of the magistracy as an institution is not an easy task and criticism of its pace should be tempered with an understanding of the associated demands. Entrenching the independence of the magistracy requires legislative and institutional changes that cannot be implemented overnight. It is also a sizeable institution which demands considerable administrative support which must be balanced with protecting magistrates' independence. With time, it is likely that several of the issues mentioned in this chapter will be challenged either through the courts, or through institutional adaptations, further changing or clarifying the institutional status of the magistracy and further entrenching their independence as judicial officers.

REFERENCES

- Adam, H & Giliomee, H. 1979. *The rise and crisis of Afrikaner power*. Cape Town: David Phillip.
- Boraine, A. 2000. *A country unmasked*. Oxford: University Press.
- Cameron, E. 1990. Judicial Accountability in South Africa. *South African Journal on Human Rights* Vol 6 251-265. Cape Town: Juta and Company.
- Carr-Saunders, AM. 1966. Professionalisation in historical perspective. In Vollmer, HM and Mills DL (eds). *Professionalisation*. New Jersey: Prentice-Hall.
- Chaskalson et al 1998. The legal system in South Africa 1960-1994: representations to the Truth and Reconciliation Commission. *South African Law Journal* 115(1) 21-36. Cape Town: Juta and Company.
- Corbett, M. 1998. Presentation to the Truth and Reconciliation Commission *South African Law Journal* 115(1) 17-20. Cape Town: Juta and Company.
- Corder, H. 1984. *Judges at work: the role and attitudes of the South African appellate judiciary 1910-1950*. Cape Town: Juta and Company.
- Didcott, J. 1980. Memorandum and other submissions to the Hoexter Commission. *South African Law Journal* 651-675. Cape Town: Juta and Company.
- Dugard, J. 1978. *Human rights and the South African legal order*. New Jersey: Princeton University Press.
- Dung, LT. 2003. 'Judicial independence in transitional countries'. United Nations Development Programme: Oslo Governance Centre.
- Dyzenhaus, D. 1998. *Judging the judges, judging ourselves. Truth, reconciliation and the apartheid legal order*. Oxford: Hart Publishing.
- Ellman, S. 1992. *In a time of trouble: Law and Liberty in South Africa's State of Emergency*. Oxford: University Press.
- Forsyth, C. 1985. *In danger for their talents, a study of the appellate division of the supreme court of South Africa 1950-1980*. Cape Town: Juta and Company.
- Franco, J with Miller, K. 2004. *Ethical Issues for Magistrates: manual for trainers*. Cape Town: Law, Race and Gender Research Unit.

Franco, J & Powell, C 2004. The Meaning of Institutional Independence in Van Rooyen v The State. *South African Law Journal* 121(3). 562-579 .Cape Town: Juta and Company.

Friedman, G. 1998. Submission to the Truth and Reconciliation Commission on the role of the judiciary. *South African Law Journal* 115(1) 56-63. Cape Town: Juta and Company.

Gready, P. & Kgalema, L. 2000. 'Magistrates under apartheid: a case study of professional ethics and the politicization of justice'. Research paper for the Centre for the Study of Violence and Reconciliation. August 2000.

Hahlo, H.R & Kahn, E. 1960. *The Union of South Africa: the development of its laws and constitution*. South Africa: Juta and Company.

Hayner, P. 2001. *Unspeakable truths: confronting state terror and atrocity*. New York: Routledge.

Haysom, N. Smuts, D. Plasket, C. & Murphy, J. 1986. Human Rights Index. *South African Journal on Human Rights*, 2(1). 122.

Kgalema, L. & Gready, P. 2000. 'Transformation of the magistracy: balancing independence and accountability in the new democratic order'. Research paper for the Centre for the Study of Violence and Reconciliation. July 2000.

Kritz, N.J. 1995. The dilemmas of transitional justice. In Kritz (ed) *Transitional justice: how emerging democracies reckon with former regimes*. Volume 1. Washington DC: United States Institute of Peace.

Mack, K & Roach Anleu, S. 2006. The Security of Tenure of Australian Magistrates. *Melbourne University Law Review* August 2006 370-397.

Matthews, A. 1971. *Law, Order and Liberty in South Africa*. Cape Town: Juta and Company.

Mohamed, I. 1998. Address by the Chief Justice I Mahomed to the Second Annual General Conference of the Judicial Officer's Association of South Africa in Pretoria on 26 June 1998. *The Judicial Officer* 1(2) 47-48.

Moore, W.E. 1970. *The professionals: roles and rules*. New York: Russell Sage Foundation.

O' Meara, D. 1983. *Volkskapitalisme: class, capital and ideology in the development of Afrikaner nationalism 1934-1948*. Johannesburg: Raven Press.

Rauch, J. 2000. 'Police Reform and South Africa's transition'. Draft conference paper prepared for South African Institute of International Affairs Conference on crime and policing in transition: comparative perspectives, Johannesburg.

Redpath, J. 2005. 'Strengthening integrity and capacity of the courts in South Africa: an analysis of five surveys and a court assessment'. Final Report. (unpublished)

Rombouts, H. and Parmentier, S. 2002. The role of the legal profession in the South African TRC. *Netherlands Quarterly for Human Rights* 20(3), 273-298.

Russell, P. 1996. 'Towards an accountable and responsive South African judicial system'. Paper prepared for the Community Peace Foundation.

Russell, P. 2007. Introduction. In Russell, P (ed) *Canada's Trial Courts: One Tier of Two?* University of Toronto Press (pending publication).

Sachs, A. 1973. Justice in South Africa. Edinburgh: Sussex University Press

Seegers, A. 1991. South Africa's National Security Management System, 1972-90. *The Journal of Modern African Studies* 29 (2) Cambridge University Press 253-273.

Seegers, A. 1993. Towards an understanding of the Afrikanerisation of the South African State. *Africa* 63 (4) 447-497.

Serfontein, JHP. 1979. *Brotherhood of power: an expose of the secret Afrikaner Broederbond*. London: Rex Collings.

Van Blerk, A. 1988. *Judge and be Judged*. Cape Town: Juta and Company.

CASES

Van Rooyen & Others v The State & Others 2002 (8) BCLR 810 (CC).
S v Mambolo (ETV and others intervening) 2001 (3) SA 409 (CC).

LEGISLATION

Magistrates Court Act, 32 of 1944
The Magistrates Act, 90 of 1993
Regulations for Judicial Officers in the Lower Courts, 1993 (Regulation Gazette No. 5264 of 11 March 1994)
The Promotion of National Unity and Reconciliation Act 31 of 1995
The Constitution of the Republic of South Africa, 108 of 1996

GOVERNMENT REPORTS

Annual report of the Department of Justice for the period 1 July 1983 – 30 June 1984. Government Printer: Pretoria

Annual report of the Department of Justice for the period 1 July 1987 – 30 June 1988 Government Printer: Pretoria.

Annual report of the Department of Justice for the period 1 July 1989 – 30 June 1990 Government Printer: Pretoria.

Debates of Parliament (Hansard) Fifth session – Ninth parliament 7-11 June 1993 number 20.

Hoexter Commission, 1983. Fifth and final report, Part A, Volume 1. Commission of inquiry into the structure and functioning of the courts. Government Printer: Pretoria.

Justice Vision 2000: five year national strategy for transforming the administration of Justice and State Legal Affairs. Department of Justice. September 1997.

Law Commission, 1991. Project 77: Report on Constitutional Models Volume 1.

Magistrates Commission, May 2001. Rationalization of the courts: towards establishing a judicial system suited to the requirements of the new constitution: summary of a report on the position of the magistracy, the Magistrates Commission and its secretariat in the rationalization process.

Tladi, MP & Myburgh, JC. Legal opinion 271 of 2004, Chief state law adviser, 26 November 2004.

Truth and Reconciliation Commission of South Africa Report, Volume 1. 1998. Cape Town: Juta and Company.

Truth and Reconciliation Commission of South Africa Report, Volume 2. 1998. Cape Town: Juta and Company.

Truth and Reconciliation Commission of South Africa Report , Volume 4. 1998. Cape Town: Juta and Company.

NEWSPAPER ARTICLES

Sunday Times, 9/1/2005 *ANC threatens judges.*

Cape Times pg 1 4/10/2004, *Judge President slams racist colleagues.*

Business Day 19/7/2005. *Banish scourge of racism in the legal fraternity.*

(Online). Available:

<http://www.businessday.co.za/articles/zimbabwe.aspx?ID=BD4A29832>

INTERNET SOURCES

Bozalek, L. 1997. Oral submission to the TRC Special Legal Hearings. (Online). Available: http://www.doj.gov.za/trc/trc_frameset.htm. Accessed 7/7/2005.

Department of Justice, 2002. About the Department. (Online). Available: http://www.doj.gov.za/about/2002%2009_adminjustice.htm. Accessed 23/4/2005.

Department of Justice, 2004. *Re Aga boswa* brochure. (Online). Available: (<http://www.doj.gov.za/2004dojsite/brochure/Re%20Aga%20Boswa.pdf>. Accessed 21/10/2005)

McQuoid-Mason, D. 1997. Oral submission to the TRC Special Legal Hearings. (Online). Available: http://www.doj.gov.za/trc/trc_frameset.htm. Accessed 7/7/2005.

NADEL, 1997. Oral submission to the TRC Special Legal Hearings. (Online). Available: http://www.doj.gov.za/trc/trc_frameset.htm. Accessed 7/7/2005.

Noeth, J, 1997. Oral submission to the TRC Special Legal Hearings. (Online). Available: http://www.doj.gov.za/trc/trc_frameset.htm . Accessed 7/7/2005.

Omar, D. 1998. Opening address by Dullah Omar, Minister of Justice, at the official opening of the Bloemfontein Regional Office in the Free State, 1 July 1998. (Online). Available: www.info.gov.za/speeches/1998/98701_1039810778.htm . Accessed 14/5/2005.

United Nations Basic Principles on the Independence of the Judiciary. (Online). Available: http://www.unhchr.ch/html/menu3/b/h_comp50.htm. Accessed 9/8/2005.

OTHER

Bangalore Principles of Judicial Conduct 2001 in Franco, J with Miller, K. 2004. *Ethical Issues for Magistrates: manual for trainers*. Cape Town: Law, Race and Gender Research Unit.

JOASA, Written submission to the TRC, 2 September 1998.

Letters between the Truth and Reconciliation Commission and the Magistrates Commission 1997-1998.

Selected minutes of the Magistrates Commission meetings 1997-1998

INTERVIEWS

Magistrate 'Groen'	18 January 2005
Magistrate 'de Wet'	31 January 2005

Magistrate 'Brown'	1 February 2005
Magistrate 'Mandla'	2 February 2005
Magistrate 'Bikitsha'	2 February 2005
Magistrate 'Ndlovu'	3 February 2005
Magistrate 'Mphatha'	3 February 2005
Magistrate 'Smith'	9 March 2005
Magistrate 'Dlamini'	9 March 2005
Magistrate 'Lombard'	17 March 2005
Magistrate 'Dyosi'	22 March 2005
Magistrate 'Mapoi'	23 March 2005
Magistrate 'de Kock'	19 April 2005
Melanie Lue-Dugmore	14 September 2005
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